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IN
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Under the Direction of the
Departments of History, Political Economy, and
Political Science

THE LABOR LAW OF MARYLAND

BY

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PREFACE

This monograph needs little preface. The method of study is local and intensive, but I have endeavored to draw some general conclusions from the specific subject-matter treated. The book, as its title implies, is neither a text book nor a reference book, though it may serve to a slight degree in the latter capacity, but a dissertation.

I take this means of expressing my gratitude to Prof. W. W. Willoughby, who served as my inspiration and rendered me much assistance in the preparation of this monograph, and also to Prof. George E. Barnett and to Miss Anna Herkner, former Assistant-Chief of the Maryland Bureau of Statistics. Various others to whom I am indebted are mentioned throughout the text.

The monograph was completed towards the end of 1916 and, because of the author's participation in the war, it has been impossible to bring it up to date in many particulars.

M. H. L.

THE LABOR LAW OF MARYLAND

CHAPTER I

Introduction

The Problem of the Labor Law.—The labor law of a state is a peculiar combination of unwritten and statute law. It differs from most law in that it is not merely an evolution of the customary law of a community, but is a definite attempt by the community to solve, now by the common law, now by statute, an acute social problem. It does to a degree reflect the customary morality of the community, but this not unconsciously, as, for example, in the case of commercial law, but as a conscious adoption of an ethical principle for a political norm. A complete understanding of labor law requires, therefore, not merely a delving into jurisprudence, but also into political theory. We must study, not merely the law itself, but the law as an expression of the relation of the state to its citizens; the labor law in truth is one of the most interesting media in which to study the extent to which the state can justify its interference in the private life of individuals. Accordingly, although this study will be primarily a critical analysis and description of actual laws in practical operation, there will necessarily be in it an undercurrent of speculative political theory.

The state, then, in its labor law sets out to solve a very definite social problem, the problem of industrial unrest, the problem of reconciling and placating labor and capital. The history of this activity of the state stretches back six or seven centuries, and the policy of the state has varied from complete aloofness to intimate intervention.

Logically and perhaps historically the first instrumentality made use of by the state in meeting the labor problem is the common law. This results, not from an active intent on the part of the state to solve any problem, but from a quiescent attitude towards an unimportant phenomenon. The common law is turned to before the labor problem assumes any special characteristics of its own, and the various cases are settled according to the general principles of the common law as laid down in cases between individuals who are in no special relation to each other. If, in the beginning, as is usually the case, no economic question obtrudes into the case, but the matter is one of pure law, the decision based on former precedents will work substantial justice. When, on the other hand, the relative economic position of the two parties is of importance, decisions based on pure law will not be adequate and will often entirely fail to settle the question at bar. When, as always happens, the economic status of the parties does not merit attention until after the deciding of cases involving similar matters, but not calling into question the economic relation, it is practically impossible for the judges when the economic question is presented to them to disregard the precedents and to dispense economic justice and not justice according to law. Common law does, as is often said, progress and grow with the times, but more often legislation is necessary to make it entirely adequate. Thus the common law of negligence did not meet the requirements of industrial accidents, and employers' liability and compensation laws were the result. Thus the common law of individual bargaining and competition does not seem to meet the requirements of collective bargaining, and legislation recognizing the validity of unionism is being demanded.

A more serious inadequacy of the common law, however, as a means of solving the labor problem arises from the inherent characteristic of that law as a system of jurisprudence. The common law is remedial, compensatory; labor conditions call for regulation, prohibition. The com-

mon law seeks to relieve the sting of a wrong after it has been committed; labor conditions necessitate regulations making impossible the commission of the wrong. A close scrutiny of the entire field of the common law will reveal no principles which could support such movements as the "safety first" and "living wage" propagandas. Even equity with its canons of preventive relief against irreparable injuries does not furnish a proper foundation for the state control of labor conditions. Thus, though the state could and does depend to a great degree upon its unwritten law in solving the economic problem of labor and capital, it must and does every day more and more seek the answer in social legislation.

But the first manifestations of state activity in the field of labor legislation were of an entirely different nature from what is now usually referred to as social legislation. These laws, of which the Statute of Laborers, passed after the Black Death, with its later variations and the Elizabethan Statute of Apprentices are the classical examples, were not based upon any economic principle of the welfare of the laborer, but, in so far as any general principle of economics was involved, upon a desire to keep low the cost of commodities. Rather, it may be said, these laws were secured by the dominant legislative class, the monied class, for its own immediate benefit. In this sense these laws, like most labor laws, were class legislation and nothing else. But there did develop under the name of mercantilism, of which these two laws were precursors, a theory of state activity which entirely neglected the interests of the workingman. Under this system the paternalistic state in its endeavor to develop itself through its commerce subordinated the laborer to the merchant and subjected him to minute control in many of the terms of his employment. It is, of course, true that the workingman whom this legislation affected had just emerged from the status of serfdom and was a new and disturbing factor in the industrial life of the time. But so thorough was this repressive legis-

lation that the new, free laborer was hardly in a better position than the former villein.

It was against this system that Adam Smith and Jeremy Bentham wrote; and as a result of their preachings there ensued the period of laissez-faire in the relation of the state to labor. At the climax of this individualistic philosophy the state retired almost completely from the regulation of economic affairs. Competition was relied upon to work the salvation of society. The individual laborer was made perfectly free to bargain for his own terms and to secure his own economic betterment. The state progressed through the progress of its individual citizens.

The period of laissez-faire marked a real and substantial advance for the workingman, but it was short-lived. It was not any inherent fallacies in the theory which caused its modification—the philosophy of individualism has never been abandoned—but rather a change in the actual conditions to which the theory had to be applied. Contemporaneously with the growth of laissez-faire individualism occurred that stupendous advance in industrialism which is usually termed the Industrial Revolution. With the invention of steam-driven machines and modern means of transportation the factory system of manufacture speedily took the place of the small shop system. A single employer began to employ hundreds and then thousands of laborers. The laborer, though legally and theoretically free to bargain with the employer for the terms of his employment, found himself practically at such a disadvantage that the employer could hire him almost on his own terms. The labor union was the workingman's answer to the factory system, but it has not yet proved adequate in itself. The state has, therefore, stepped in to guarantee to the laborer certain terms and conditions of employment which have been conceived to be reasonable and necessary.

This is the present-day status of labor legislation. The doctrine of laissez-faire survives in so far as the state leaves to the common law and individual action all that

these instrumentalities are capable of handling. Laissez-faire is abandoned in so far as the state, recognizing the inequality of the bargaining power of employer and employee, regulates as seems best for the welfare of the state certain of the terms of the bargain. The state sacrifices theoretical individual liberty for what is considered a truer means of self-development. The state in its endeavor to offset this inequality of bargaining power has returned to some of the functions of the medieval paternalistic state; but those who wish to make the distinction between the former antagonistic and the present sympathetic attitude of the state to labor sometimes term the present state maternalistic rather than paternalistic in its regulations. To a certain degree this distinction is specious and more will be said of it in the final chapter of this study. It is sufficient to say here that the solution which has been attained in practical legislation is hardly a final remedy.

In the United States there is, besides political theorizing upon the relation of the state to labor, another fundamental to be considered. Our written constitutions enforced by powerful courts impose a legal limitation upon state activity as well as a philosophical limitation. While the state is quiescent the constitution is unobtrusive; but when the state functions in enacting laws the constitution exercises a tremendous restraint upon state action. The whole of state activity in the United States affecting the labor problem has been manifested within the last of the periods just discussed, that of laissez-faire ameliorated in favor of the laborer. All of this social legislation comes in conflict with the "equal protection of the laws" and the "due process of law" clauses of the Fourteenth Amendment of the federal constitution or similar provisions of the state constitutions. Both require brief discussion.

The essentials of "equal protection of the laws" are easily stated. Every citizen of a state is entitled to equal treatment by the laws of that jurisdiction and to all the privileges extended to any other citizen by the law. Reasonable

classification, however, is permissible if exercised on administrative or any other justifiable grounds. Legislative classifications are prima facie reasonable.

The "due process of law" clause is not so easily explained. Historically it is traced back to the per legem terrae provision of Magna Charta, but as a substantive provision of law its development is recent. Strictly conceived this clause might have been construed as making perpetual the eighteenth century doctrines of laissez-faire and natural rights, and as limiting state activity to the narrowest bounds. The clause luckily never received so narrowing an interpretation, but was merely construed as allowing the courts to inquire whether property appropriated by legislation was taken for a legitimate state purpose. Early in their interpretation of this clause, especially with reference to social legislation, the courts evolved the police power of the state as an exception to the prohibition and through this exception the effect of the prohibition has been much curtailed. It is indeed more profitable to consider the cases dealing with labor legislation under the Fourteenth Amendment as limiting the extent of the police power than as defining due process of law, for the exercise of the police power is due process of law.

Thus viewed, the explanation becomes more simple. It is still impossible to define and limit exactly the police power, but it is now possible to give rather succinctly the two extreme views to one of which most decisions adhere. There is, on the one hand, the strict legalistic view that the police power extends only to the protection of the health, safety and morals of the community; that the state activity should be strictly defined; that none but the most moderate of social legislation should be enacted. The Maryland Court of Appeals leans to this view, although it is not entirely constant in its principles. The other view is that the police power extends also to the furtherance of public convenience. As put by Justice Holmes, "it may be said in a general way that the police power extends to all the great

public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[1] This is the view held by the Supreme Court and appears to exercise practically no restraint on really seriously considered legislation.[2]

Having these fundamentals in view, even as so inadequately outlined in this chapter, the object and plan of this study may be made clear. The primary purpose has been to describe and analyze all of the law of Maryland in any way concerning labor. In order better to understand the law of Maryland, I have usually brought it into contrast or comparison with some conceived ideal borrowed sometimes from purely theoretical sources, but more often from the law of other communities, generally of other States of the Union such as Massachusetts, New York and Wisconsin, but when necessary going to England and Continental Europe for suggestions. In fulfilling this primary purpose there must usually be some incidental consideration of the manner in which Maryland has met the problems which have just been outlined. This discussion of political theory will be kept strictly in the background until the last chapter, which will endeavor to lay down some constructive principles. The plan of the work has been to follow as closely as possible the logical development of state activity. No space has been allotted to the consideration of the law of the labor contract, since this law is merely an adaptation of ordinary contract law and contains no distinctive features. The study begins with the law of the labor union, which has been almost entirely left to the common law. Then follows a consideration of the law of workmen's compensation, which marks the only complete abandonment of any principles of the common law referring to labor. The three succeeding chapters deal with the new social legis-

[1] Noble State Bank v. Haskell, 219 U. S. 104.

[2] For a statement of the author's sympathy with this view, see his article, "Imminent Constitutional Shams," in the Forum, vol. 57, Jan. 1917, pp. 91–98.

lation, demonstrating how far the laissez-faire theory has been abandoned; and the study ends with chapters on the administrative system and the relation of the state to labor. But before taking up the law itself it is necessary to set forth some uninteresting, but necessary, facts about Maryland.

Maryland Conditions.—As far as labor law is concerned Maryland will be found to be, if not a typical American State—for no State is typical when legislation is in question—at least a mean or average State. Its law displays none of the extremist characteristics of the experimentally inclined Western and Middle Western States, nor does it lag with the Southern States in the wake of social legislation. It follows rather closely on the heels of New York and more remotely after the more radical Massachusetts. Considering its geographical position Maryland, with its somewhat backward labor law, may be judged rather leniently.

The State is usually classed as one of the Southern States. Though the northernmost of these States and outside of the Confederacy in the Civil War, it was a slave State and had all the traditions of the aristocratic, non-industrial South. Moreover its southern neighbors, Virginia and West Virginia, have the typical Southern labor law, perhaps sufficient for their needs, but by no means effective. On the other hand, Maryland has come to be in the class of industrial States and, in this respect, her competitors lie to the north rather than to the south. But, here also, the State is restrained rather than spurred on by its neighbors. Pennsylvania, which borders the whole northern boundary, has until recently been most delinquent in its labor law and many of the odious half measures in the Maryland law have been caused by the potential competition of Pennsylvania's industries. These excuses for the inferiority of the Maryland law call up an explanation of another cause of Maryland's backwardness. Like most Southern States, Maryland's party politics are at a low ebb. The State does not seem to have mastered the art of clean politics and

it is dominated much more than is desirable by mediocre politicians. Although this condition does not perhaps account for many statutory shortcomings, its effect is evident in the administration of the law.

Aside from these external facts, there are other practical difficulties which must be mastered in solving by legislation the labor problem. The population of Maryland in 1910 was 1,295,346, about evenly divided between urban and rural. Of the urban population, however, 558,485 people are collected in Baltimore City, which is the only city of any size in the State. There are besides Baltimore three other cities of between ten and twenty-five thousand population and eleven other towns which are classified as urban. Baltimore is, therefore, practically the only large industrial center in the State and in it alone are found many of the social problems which are usually the occasion of legislation. Maryland, furthermore, is divided into two unequal parts by the Chesapeake Bay. The Eastern Shore, with a population of 200,161, is almost entirely rural and the only industry of any importance is canning, which for political as well as administrative reasons is almost unregulated. The Western Shore may again be divided into two sections, the Western Shore proper and Western Maryland. In the first of these is Baltimore, which practically dominates the industrial life of the section. Western Maryland lies in the Appalachians and centers around Cumberland, the second largest city in the State. Its chief industries are coal-mining and transportation. Western Maryland is a narrow strip of country, and it is chiefly here that the low standards of the Pennsylvania and West Virginia labor laws have to be guarded against. Geographical and economic sectionalism accounts for the great amount of local legislation on the Maryland statute books and to some extent for the lack of coordination in the administrative system.

In 1910 there were employed in gainful occupations a

total of 541,164 persons, of whom 410,884 were male and 130,280 were female, comprising, respectively, 81 per cent and 25 per cent of the total population of each sex above the age of ten years. Their occupational distribution was as follows:

Occupation	Number	Per Cent
Agriculture	171,100	21.6
Manufacture	172,155	31.8
Domestic and personal service	78,820	14.6
Trade	61,646	11.4
Transportation	42,776	7.9
Clerical	28,871	5.3
Professional	23,474	4.3
Public service	8,954	1.7
Mining	7,368	1.4

CHAPTER II

The Labor Union

The Law of Union Activities.—Historically the law of labor union activities was the first evolved by the state; evolved, not enacted, for most of it is judge-made law. Logically considered, also, the law of union activities must be accorded first place; for, granted that the labor union receives favorable treatment from the state, it seems easy to demonstrate that hardly any other state activity is necessary.

The Maryland labor law of the present day is based on and grew from the early English law, and hence some slight treatment of that law is necessary. The beginnings of the English law, however, are somewhat surrounded in mystery. It seems that the earliest activities of the union were branded as criminal conspiracy at the common law, though it is by no means certain that the offense of criminal conspiracy was not the creation of a statute. Be this as it may, before labor unions as such came into prominence statutes were passed early in the eighteenth century forbidding combinations of laborers for the raising of wages and other purposes and making such combinations criminal conspiracies. These statutes grew in severity and comprehensiveness until the beginning of the nineteenth century. Thereafter the law became more liberal. The cause of this change was the union itself. Utterly unsanctioned and potentially oppressed in its most beneficial activities by the law, it nevertheless continued to exist. It was not a casual phenomenon: it was an economic growth, necessary to and justified by industrial conditions. Slowly and often surreptitiously it grew, but grow it did until, in the atmosphere of greater political liberty, it made itself felt in legislative halls. In

1875 the ban of criminal conspiracy was lifted and finally, in 1906, the union was granted a most enviable place in English law.[1]

Maryland in 1776 adopted, with the other twelve States, the English law of union activities in so far as it was consonant with American ideas and ideals. This law was the harsh, antagonistic law of the eighteenth century hardly modified at all in the adoption. Thus, in an early case, the Maryland Court of Appeals sums up the law of criminal conspiracy: "An indictment will lie at common law—(1) for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only; (2) for a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public—for a conspiracy (by two or more) to raise their wages, either of whom might legally have done so; (3) for a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation; (4) for a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat if effected by an individual; (5) for a malicious conspiracy to impoverish or ruin a third person in his trade or profession; (6) for a conspiracy to defraud a third person by means of an act not per se unlawful and though no person be thereby injured; (7) for a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time."[2] It is obvious that, either under the third clause declaring indictable a conspiracy to raise wages or under the fifth referring to a conspiracy "to impoverish or ruin a third person in his trade or profession," a labor union would almost surely have found itself running counter to the law. In fact, if the union were merely formed for one

[1] For a complete discussion of the early law of conspiracy as applied to labor unions, see J. W. Bryan, English Law of Conspiracy.
[2] State v. Buchanan, 5 H. & J. 317 (1821).

of these purposes—and it must be remembered that these prohibitions against conspiracy referred to the indirect effects as well as to the direct purposes of the union—it would be absolutely barred; for, in the same case, the court declared: "A conspiracy is a substantive offence and punishable at common law, though nothing be done in execution of it." It seems, indeed, that this decision was entirely efficient, for no cases concerning trade unions came before the Appeal Court under this decision. But it must not be imagined that merely because no cases against unions came before the court there were no unions. The decision was efficient and complete, but hardly effective. As in England, trade unions seem to have flourished even under the shadow of the law and to have carried on trade disputes, perhaps not legally, but extra-legally.

It was probably because of the growing strength of the unions, especially as political institutions, that the legislature of 1884 was compelled to recognize their existence. In that year two bills were enacted legalizing labor unions. The first declared that an act of a combination formed in "furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as an offense (nothing in this section shall affect the law relating to riot, unlawful assembly, breach of peace, or any offense against any person or against property)."[3] The second was an addition to the incorporation acts, permitting the incorporation of trade unions "to promote the well-being of their every day life, and for mutual assistance in securing the most favorable conditions for the labor of their members."[4] In this year, then, we can say, the labor union entered the realm of law in Maryland. In this year, also, the law concerning unionism took a different turn. Prior to this the unions had been subject to the law of

[3] Laws 1884, Ch. 266; Code 1914, Art. 27, Sec. 40.

[4] Laws 1884, Ch. 267; Code 1904, Art. 23, Sec. 41. Incorporation since 1908 takes place under the general law of incorporation, Laws 1908, Ch. 240, Secs. 2–5; Code 1911, Art. 23, Secs. 2–5.

criminal conspiracy; after these acts the employers were able to combat the unions in court merely by civil suits or injunctions. Prior to this year, moreover, no cases involving unionism came before the Court of Appeals, so that the Maryland law, in contradistinction to the English law, has practically nothing to do with criminal conspiracy.

The salient principle in the Maryland law of labor unions —and indeed in all American law on this subject—is the right of the individual to his own property and, what is practically identical in law, the right to freedom of contract. There has also been evolved another right, sometimes considered a property right, the right to carry on one's business or to work at one's trade free from outside interference. This right is indeed a recent creation of the courts, and, to a certain degree, an unfortunate creation. It is broader than the right of personal freedom and was, therefore, useful in ruling against some of the first harsh, but elusive, activities of the union; but there are two sides to this right and the unions soon came to assert it on their side. There are in every conflict between union and employer two conflicting rights. A strike is called for an increase in wages or for shorter hours, what the employees conceive to be their rights; the employer forthwith asserts that his freedom of contract is being abridged. A labor union stipulates that its men shall work only in a "closed shop," and the discharged non-union man sues for a violation of his right to work as he will. To generalize briefly in advance, we shall find in considering strikes, boycotts, closed shops—in short, all of the means by which a union makes its demands effective—that "honest effort to better the conditions of employment by the members of a labor union is lawful,"[5] though it may incidentally interfere with the right of an individual to work on such terms as he may see fit. If, however, the aim of the union is wilful interference with the individual, though the union may thereby be indirectly benefited, the union is operating contrary to

[5] Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036 (1912).

the law. Let us first, however, consider in some detail the law relating to the various activities of the unions.

"The right to organize and to utilize their organization by instituting a strike is an exercise of the common law right of every man to pursue his calling, whether of labor or business, as he in his judgment sees fit."[6] A strike per se is not unlawful; it is the purpose[7] or the means[8] which renders it unlawful. "The law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion,"[9] so that it may be said now and for all that force is unlawful; and, for the sake of brevity, the consideration of violence may be dismissed from the following discussion.

The leading Maryland case on labor organizations is the case of My Maryland Lodge v. Adt,[10] and it will be best to quote first from that part of the decision relating to strikes. "Employees have a perfect right," says the court, "both as individuals and in combination, to fix a price upon their labor, and to refuse to work unless that price is obtained. They may organize to improve their condition and to secure better wages. They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy." Laborers, therefore, may strike for an increase of wages, for shorter hours, for better working conditions, for specified methods of employment or of pay.[11] They

[6] Martin, Modern Law of Labor Unions, p. 36.
[7] Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457.
[8] My Maryland Lodge v. Adt, 100 Md. 283, 68 L. R. A. 152.
[9] Ibid.
[10] Ibid.
[11] It has even been held in a federal court (Delaware, L. & W. R. R. Co. vs. Switchmen's Union, 158 Fed. 541) that workmen may strike for such purposes even though it be in violation of their service contract. What the court very probably meant was that these strikers could not be enjoined; they are clearly liable for damages.

may, it has been held, even seek the aid of their fellow workers in another establishment to join with them in a sympathetic strike if the employer is striving to circumvent the efforts of the strikers by having his work done in brother employers' shops.[12] But this case, although well considered and precise, must be confined to the exact point involved; for a sympathetic strike, like a secondary boycott, usually brings into the contest an uninterested third person who, if injured, usually has a cause of action against the union. Where there is such a community of interest as in this case, however, a sympathetic strike is not actionable. Another danger which must be avoided by the sympathetic strike as well as by all other union activities is the possibility that the union may be running counter to the contract liabilities of a third party, for "a man who induces one of two parties to a contract to break it, intending thereby to injure the other or obtain a benefit for himself, does the other an actionable wrong."[13] This is a fundamental rule of contract law and has no special application to the law of the labor union: it is mentioned here merely because of the number of times the union has felt its force.[14]

The foregoing conclusions that a strike is a legal instrument of the labor union apply only when the disputes are strictly limited to the two parties concerned, the strikers and their employer; when a third party suffers injury, as was intimated in discussing the sympathetic strike, the strike stands in less favor with the courts. Unfortunately it is a rare strike which does not directly or indirectly affect some third person. The cause of this can readily be seen if we consider the problem from the point of view of the unions. The strike cannot be effective if the employer is able to fill easily the places of the strikers with non-union

[12] Iron Moulders' Union v. Allis-Chambers Co., 166 Fed. 45; 20 L. R. A. (N. S.) 315.

[13] Gore v. Condon, 87 Md. 368, 376.

[14] A few of these cases only are here cited: Garst v. Charles, 187 Mass. 144; Folsom v. Lewis, 208 Mass. 336; Iron Moulders' Union v. Allis-Chambers Co., 166 Fed. 45.

men. The unions strive to prevent this by picketing and by making the union monopolistic as to that particular class of workmen. Again, the strike will not attain the maximum efficiency if the standard which is obtained by the union is continually undermined by the cut-throat competition of non-union men in the same shop. The unions fight against this evil with the instrument of the closed shop. Again, the strike will often fail entirely if other employers or dealers trade in their normal manner with the tabooed employer. To offset this, the union has evolved the boycott, or more correctly in the technical economic phrase, the secondary boycott. But, before considering any of these more advanced forms of union activity, it will be first necessary to consider one more form of strike, a rather more advanced and more involved form of this particular activity which might be called a cross between the strike and the closed shop. It is a strike, not to procure an immediate advantage, as, for example, a raise of wages, but to strengthen the union by dictating to the employer certain terms of employment for all men in his shop. A Maryland case will illustrate.

In Lucke v. Clothing Cutters' Assembly[15] the appellant, a non-union man, had had permanent employment terminable at will with the New York Clothing House. He was objected to by the appellee, who notified the clothing house that they objected to working with non-union men. Lucke applied for membership in the union; but, because of the lack of employment among its then members, the appellee refused him membership. Later the union sent notice to the employer that, if Lucke were not discharged, it would notify through its official organ all labor organizations of the city that "the house was a non-union one." Feeling that it was threatened with a boycott, though during the trial the union denied that this was its intention, the New York Clothing House discharged the appellant, who later

[15] 77 Md. 396; 19 L. R. A. 408 (1893).

brought suit against the union for damages. The court held that Lucke was entitled to damages since the union had interfered with his right of property and freedom of contract. This interference may have indirectly benefited the union, but it wilfully and directly injured the individual in one of his fundamental rights; and the court said:

"It is not necessary that such interference [of the union with a laboring man's privilege of seeking an honest livelihood] should have been malicious in its character. . . . In this case we think the interference of the appellee was in law malicious and unquestionably wrongful . . . and, by so doing, it [the appellee] has invaded legal rights of the appellant for which an action properly lies.

"When the state granted its generous sanction to the formation of corporations of the character of the appellee (Code 1904, Art. 23, Sec. 37) it certainly did not mean that such promotion (of the well-being of their every day life and for mutual assistance in securing the most favorable conditions for the labor of their members) was to be secured by making war upon the non-union laboring man, or by any legal interference with his rights and privileges. The powers with which this class of corporations are clothed are of a peculiar character, and should be used with prudence, moderation and wisdom, so that labor in its organized form shall not become an instrument of wrong and injustice to those who, in the same avenue of life, and sometimes under less favorable circumstances, are striving to provide the means by which they can maintain themselves and their families."

To understand more thoroughly the significance of this case let us look at one apparently opposed to it, that of Pickett v. Walsh,[16] in which was held legal a strike to enforce an agreement between a bricklayers' union and a contractor, by which the union agreed to work for the contractor if he would employ its members to perform some tasks

[16] 192 Mass. 572; 78 N. E. 753; 6 L. R. A. (N. S.) 1067 (1907).

closely allied to, but less skilled than bricklaying. The court differentiated between these two cases on the ground that the strike in the latter case was on a matter directly concerning the two parties to it, the strikers and the employers, and that the laborers were striving directly to improve their own conditions. This distinction seems to have been generally followed,[17] but in discussing this question some of the finest legal reasoning has been used. The tendency seems to be to find a community of interest among the strikers and between them and their brother unionists who are not actively engaged in the strike, but for whose benefit the strike is declared, and, on the whole, the trend seems to be towards holding legal strikes aimed at securing these competitive advantages for union laborers. The distinction, however, is still good between mediate and immediate quarrels and will certainly be used in hard cases where justice seems to demand it.[18]

If the tendency has been towards increasing the rights and powers of trade unions in securing the privileged employment of its own members, the absolute contrary has been true with respect to the legality of picketing. Labor unions, in fact, have suffered to a great degree because of of injunctions restraining them from posting members on the environs of the place of strike to persuade strike-breakers not to take employment in the hostile shop and to obtain information as to the employer's activities. Picketing, it is true, was far from being such a milk-and-water affair twenty-five years ago as it is now; it was in this activity, perhaps, that the trade unions showed their ugliest side and incurred the ill-will of the public. This popular estimate seems to have been reflected to a great degree in the courts, which, beginning by merely discountenancing picketing that was contrary to public order, have come to

[17] E. g., National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 256, 26 L. R. A. (N. S.) 148; and Meur v. Speer, 32 L. R. A. (N. S.) 792 (Ark.).

[18] For a fuller discussion see note in 6 L. R. A. (N. S.) 1067.

look upon almost all picketing as enjoinable, if not absolutely criminal.

A general declaration of the law was given in the case of My Maryland Lodge v. Adt:[19] "They (the union laborers) may even use persuasion to have others join their organization.[20] They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way. . . . But the law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion." The troublesome question has been, what is intimidation and coercion? Thus mere argument, where the odds were four or five to one in favor of the arguers, has been said to constitute unlawful intimidation.[21] Peaceful picketing, which incidentally interfered with customers patronizing the picketed shop, has been enjoined.[22] A fair statement of the law is contained in the following: "The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing by a labor union is not unnecessarily unlawful if the pickets are peaceful and well behaved; but, if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employed, it becomes unlawful. . . . To picket . . . was in itself an act of intimidation and an unwarrantable interference with the employer's rights." Even if pickets are not guilty of intimidation, "the complainants are entitled to protection."[23] The Maryland law would seem to go quite as far as this Illinois case, for, in spite of the rather liberal language just quoted from the Adt case, the court in that

[19] 100 Md. 283; 68 L. R. A. 752.

[20] See, however, Hitchman Coal & Coke Co. v. Mitchell et al., 38 Sup. Ct. 65 (1917).

[21] Allis-Chambers Co. v. Iron Moulders' Union, 150 Fed. 155.

[22] Foster v. Retail Clerks' Intern'tl Protective Ass'n, 78 N. Y. S. 860.

[23] Barnes v. Chicago Typographical Union, 232 Ill. 421; 14 L. R. A. (N. S.) 1018.

case upheld an injunction which practically forbade all picketing, even for purposes of information only. It would then seem that picketing has been in law practically plucked of its stings: picketing can perhaps be safely used only as a means of procuring information. This would indeed be a hard blow at unionism if it were not for the fact that an employer will not usually combat in the courts peaceful picketing unless it is used in conjunction with an unlawful strike or boycott. As a practical matter it may then be said that peaceful picketing as an adjunct of any other lawful activity of a union is not likely to lead to any action at law. If used in its really civilized form this most powerful weapon of struggling unionism may be still of avail in industrial disputes.

Thus far we have been considering the union mainly as a body of workingmen; it has another aspect, that of a body of consumers; and it is upon this quality of its membership that the union relies in the activity usually known by the name of the boycott. In its conflict with the employer the boycott is a frequent weapon of the union. In itself, as will be seen, it is not a very efficient weapon; but in conjunction with the strike, with which indeed it is generally used, it often enables the union to achieve what an unaided strike might not have attained. There are two degrees of the boycott, primary and secondary; but the courts do not seem to observe the distinction, some including the two classes under one head, others limiting the two classes at entirely different points, and a great number having reference to the second class alone when they speak of the boycott. The primary boycott is the act of a combination of individuals who agree among themselves not to patronize a certain dealer. The secondary boycott is the act of a combination which tries to economically outlaw a certain dealer by intimidating third parties, either by strike or boycott, to prevent them from patronizing this dealer. Assuming the object of the boycott to be legal, the primary boycott is gen-

erally a legal activity of the union, whereas the secondary boycott is quite as generally deemed illegal.

In Maryland we have a leading case on this subject, and it may be well to consider it specifically. The case, My Maryland Lodge v. Adt,[24] is one of secondary boycott, but the court laid down some additional law of utmost importance. Adt, upon refusing an increase in wages, had been struck against. Further, the union sent circulars to the brewers who were in the habit of contracting with Adt for machinery asking them to boycott Adt on the ground that he no longer had a union shop. Upon failure of the brewers to meet this request, the union circulated "unfair" broadsides against them; and in self defense the brewers were compelled to withdraw their patronage from Adt, whose business was thereby practically ruined. On these facts the Court of Appeals upheld an injunction against the union, and declared such methods of warfare manifestly unfair and actionable. The court in this case merely held illegal the secondary boycott; but some of its language is so loose that it may be possible to interpret it as declaring all boycotts illegal, especially as the court makes no distinction between the two classes of boycott. It is submitted, however, that if the court was referring to the primary boycott per se, its stand is hardly justified.

The distinction, indeed, between the two classes of boycott has, as was intimated, been sustained by the great weight of authority.[25] An individual has a right to bestow his patronage where he wishes; and the mere fact that he combines with others in carrying out his purpose does not make the act prima facie actionable. To make it illegal there must be in the object or means of the primary boycott some malicious purpose, as the injury of another without any direct benefit to those engaged in the boycott. The

[24] 100 Md. 238; 56 Atl. 721; 68 L. R. A. 752 (1905).

[25] See American Federation of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83; 32 L. R. A. (N. S.) 748; and note on this case in L. R. A.

primary boycott being in itself lawful, any publication in furtherance thereof, if that is the purpose of the publication and no intimidation or coercion is intended, would also be lawful;[26] but here again, as in the question of picketing, the courts are prone to see intimidation in any publication, with the result that the unions must be most careful in their use of legally recognized weapons. If, then, it is dangerous to publish unfair lists in primary boycotts, it is of course an absolute infringement upon the rights of another to publish such a list in pursuance of a secondary boycott.

It is needless and would be indeed useless to enter here into a detailed investigation of what has been held illegal boycott. The rule seems to be that if a third party has been drawn into the controversy between the two contending factions, then the boycott is a secondary boycott and he against whom it is being prosecuted may recover for his damages.[27] This, although it seems to be well-settled law, involves an inconsistency. Take, for example, the Adt case: employees strike for increase of wages and in pursuance of that strike for a perfectly lawful purpose institute a boycott against the employer. In the Adt case there was some question as to the legality of the means used to enforce the boycott, but that does not seem to have influenced the decision. Then, granting the legality of the strike, why should it be illegal to enlist the sympathies of third persons who deal with the employer? If these third persons are injured,

[26] See note in 32 L. R. A. (N. S.) 1017; and cases cited there, mostly New York cases.

[27] Thus it has been held that "a combination of employees to compel their employers, by threats of quitting and by actually quitting their service, to withdraw from a mutually profitable relation with a third person having no effect on the character or reward of the employees' services, for the purpose of injuring such third person, is a boycott and an unlawful conspiracy." (Thomas v. Cinn. etc. Ry. Co., 62 Fed. 803); and that it was illegal for a union to boycott an employer of non-union labor by refusing to work for another employer who furnished him with supplies. [Burnham v. Dowd, 104 N. E. 841 (Mass.).] There are innumerable cases on this subject, generally decided on a question of fact.

are coerced into the boycott, they have their redress in the courts against the union. But why should the employer be entitled to plead in a controversy between himself and the union the injury of these third parties, who themselves do not complain? The employer, it is true, is injured, but he is injured in the course of fair competition between himself and the union, and it is damnum absque injuria. If we grant that a strike legally pursued is justified to raise wages, a boycott for the same purpose, as long as no third person complains, would seem equally justifiable, and the employer should not be heard to voice a third party's injury in protection of himself.

Perhaps the real explanation of the courts' antagonism to the boycott is to be found in their fear of its potentialities—for it is one of the most efficient weapons of the union. But if this explanation is true, the courts are certainly guilty of a wrongful invasion of the legislative domain and the explanation is merely a confession of this.

Closely connected with the boycott and apparently a much more effective means of enforcing the boycott is the frequently occurring rule of a labor union forbidding its members to handle non-union material, that is, material prepared by non-union men. It has been held that the union may under conditions issue such a rule. Where the object of a labor union or the purpose of its action under this rule is principally to injure another or his property, the agreement forming the union is unlawful; but where the purpose is only to advance the interests of the members of the union the union is not illegal and such rules may legally be enforced.[28] Here, again, the distinction crops up between the "mutual advantage" of the laborers and the malicious injury of another. "So long as the motive [of the rule] is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent,

[28] Bossert v. Brotherhood of Carpenters and Joiners of America, 137 N. Y. 321; Gill Engraving Co. v. Doerr, 214 Fed. 111.

the result is not a [illegal] conspiracy, although it may necessarily work injury to other persons."[29]

The distinction between this rule and the boycott is not easy to perceive at first blush. The courts have distinguished it upon the ground that the rule was laid down before any difference arose between the employer and the union, and that hence it might impliedly have entered into the service contract. Moreover, as stated above, the courts have recognized the direct interests of the laborers in the rule; and, finally, the quarrels have been directly between the employer and the union, the boycotted dealer did not enter into the consideration. This method of boycotting is naturally only applicable in well-organized trades with a stable membership, and the older and more stable unions have to a great extent made use of it. It would seem one of the most effective instruments that the unions can use; for, not being tainted with the ancient obloquy of trade unions, the courts have been more liberal in their attitude toward it.

Precisely corresponding to the boycott, but issuing from the other party to the controversy, is the blacklist. It is a weapon that employers have been fond of using against the strike. As such it would seem to have generally been held legal. That is, if the employer of the shop which is the object of the strike should distribute to his brother employers, who are associated with him in trade agreements, a list of his striking employees with the intention that these other employers should refuse the strikers employment in their shops, the courts would almost certainly hold such a blacklist lawful. But it is practically impossible to be absolutely certain how far the courts will go in holding any blacklist lawful. They are here confronted with the same conflict that has been evident in all the law of union activities, the conflict of the right of the employers to carry on their business as they see fit and the right of the employees

[29] National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 256, 26 L. R. A. (N. S.) 148.

to the free use of their laboring powers. As was said in a recent Maryland case, "neither [the employer nor employee] has the right to interfere, without cause, with the business or occupation of the other."[30] And the courts, it would seem, are more opposed to the combination manifesting itself in the blacklist than they are to the combinations of laborers against laborer. We have seen in our consideration of strikes directed against the non-union workingman, how eager the courts are to protect the laborer against the combination, but they have been somewhat restrained by the fact that the two competitors are in the same economic position. The blacklist, however, represents a combination of economically strong employers functioning to deprive a workman of his only means of livelihood. It is natural that the courts should be more prone to condemn the blacklist than a combination of workingmen.

The blacklist, nevertheless, does not always offend the courts. As a counter-weapon to the strike, as has been said, the blacklist is a proper thing. On the other hand, if the list circulated among the employers is tinged with slander, the workingman has naturally a clear right of action against the employers. In between these two extremes, it is often difficult to classify a blacklist. "Any malicious interference with the business or occupation," as our Court of Appeals has said, "if followed by damage, is an actionable wrong."[31] This is a safe enough guide where actual malice, or malice in fact, is evident in the case, as it was in our Maryland case; but the concept of malice in law, though often used by the courts in their reasoning in blacklisting cases, is no longer of much practical use because of its extreme elasticity. It would, perhaps, be sufficiently correct to say that when a blacklist is used against striking employees or to gain a legitimate interest of the employers, it is legal, but when it is used merely as a disciplinary

[30] Willner v. Silverman, 109 Md. 341; 71 Atl. 963; 24 L. R. A. (N. S.) 895 (1910).
[31] Ibid.

measure against an employee and to attain no advantage for the employer, it is an actionable tort against the individual workingman. That, at least, is the Maryland law.

This careful regard of the courts for the welfare of the individual is not directed strictly towards the unions, and is, therefore, perhaps not appropriate in this place; but so intimately is the blacklist related as a counter measure to the strike and boycott that the unions have really been much strengthened by this judicial curtailment of the employer's powers. It seems, in most cases, that the decrees of the courts have been adequate enough for the protection of the laborers, but the public has not been—or, perhaps, it is more correct to say, the unions have not been—sufficiently satisfied with this judicial protection; and in many states laws have been passed prohibiting employers from circulating blacklists. Innocent information is not prohibited, so that these statutes have uniformly been held constitutional. Maryland has no such statute, but from the tendencies of the court in the case of Willner v. Silverman[32] such a statute if it could be made effective would seem desirable, especially from the union standpoint.

At the possible risk of digression, I want to call attention here to perhaps the greatest encouragement that has yet been extended to unionism by legal enactment. With no special reference at present to Maryland law, it is yet indicative of a tendency in the law which may at some future time be realized. There have been several state statutes and one federal statute relating to interstate commerce which have declared criminally illegal the discharge or threatened discharge of employees because of membership in any labor organization. Practically all of these statutes have been held unconstitutional as depriving the employer of the right of contract without due process of law; but in the Supreme Court[33] three forcible dissenting opinions

[32] Ibid.

[33] Adair v. U. S., 208 U. S. 161; 52 L. ed. 436; and see note in this edition on State cases; Coppage v. Kansas, 236 U. S. 1; 59 L. ed. 441.

were filed against this position, the one by Justice Holmes in the earlier case in particular being most suggestive of future modifications of the severity of the doctrine underlying the majority opinion.

The closed shop contract is the highest attainment of trade unionism. It is still a method, a means to an end, but it smacks more of the ultimate desideratum than do any of the other activities of the unions. Once the closed shop is attained in an industry, collective bargaining has achieved its most valuable guarantee; and collective bargaining is a primary goal of unionism. Unions, according to their advocates and publicists, are striving, not for the elevation of the workingman above his rightful economic condition, but for the absolute equality of the laborer with the capitalist and the landlord as a claimant in distribution. All the phenomena of unionism which we have considered are indications of this ambition—the strike and boycott, the weapons of the militant, struggling union; the agreement against non-union material, a defense of the victorious union; and the closed shop, the security of the old and firmly established union. It is therefore obvious that the law of the closed shop agreement—more often an agreement than a formal contract—will be somewhat different from that of the other methods of unionism. Yet, in studying the agreement against non-union materials and the strike against the non-union workingman, a foundation has been laid down.

The law seems to be that an agreement between one employer and a labor union that he will employ only such laborers, members of that union, as the union shall specify is completely enforceable. Equally unenforceable is an agreement on the same point between all the branches of a labor union within a certain territory and all the employers of that trade within the same territory.[34] Between these two extremes lies the debatable ground. It is assumed, of course, in this discussion that the benefit of the

[34] McCord v. Thompson-Starrett Co., 198 N. Y. 587; 92 N. E. 1090.

agreement is material to the two parties and that there is no malice. The law as to this has been sufficiently threshed out.[35] The law, then, with respect to the closed shop agreement is precisely that of the common law of contracts in restraint of trade, that of conspiracies in unreasonable or indirect restraint of trade. Where the agreement between the employer and the union is too monopolistic within too comprehensive a territory—of course much smaller than the unreasonable district in trade monopolies—the agreement is an unreasonable restraint upon the individual's freedom of contract and the competition of the non-union laborer is too completely stifled. This is the opinion of the courts. In the eyes of the economist—and the argument seems sound —a trade union with complete monopoly of the labor in its district is the acme of perfection of competition, of competition among the elements of production.

The courts seem to have been led into this distinction as to extent of monopoly in a rather haphazard manner, if not absolutely against their will. The law of the closed shop has been most fully developed in New York. In the earliest case[36] the court held invalid a contract between a brewers' association and a labor union providing that no employee of the association should be allowed to work for longer than a specified time without becoming a member of the union. In the second case,[37] after several appeals and reversals, the court held valid a contract between an employer and a labor union providing for an absolutely closed shop. In this case the court specifically stated that the early case was not overruled. The critics immediately emphasized the conflict. The only way of resolving the conflict was to develop the distinction between the single employer in the enforceable agreement and the association

[35] Cases concerning the closed shop in which this point is developed are: Berry v. Donovan, 188 Mass. 353; 5 L. R. A. (N. S.) 899; Kissan v. U. S. Printing Co. of Ohio, 199 N. Y. 76; 92 N. E. 214; Hoban v. Dempsey, 104 N. E. 717 (Mass.).

[36] Curran v. Galen, 152 N. Y. 33; 37 L. R. A. 802 (1897).

[37] Jacobs v. Cohen, 183 N. Y. 207; 2 L. R. A. (N. S.) 292 (1905).

in the unenforceable. This distinction was developed in subsequent cases, and has been accepted as the rule in cases in other states.[38] Naturally, what is lawful in this respect for the labor unions is lawful for the employers, and there are several cases in which open shop agreements between employers aimed directly at the unions have been held legal.[39]

It might be profitable to present a brief and concise resumé and to draw some conclusions from the Maryland law of labor combinations before proceeding to the specific statutes which are based upon or closely allied to the existence of labor unions. Since the statute of 1884 labor organizations are not per se conspiracies. An act which is lawful for an individual is therefore perfectly lawful for a union to undertake, with the one possible exception, most apparent in the law of picketing, that in certain circumstances numbers themselves may be a menace to the peace of society. However, there is growing up in the law of torts a theory which is finding great application in labor cases that an act, though conducted for perfectly legitimate ultimate ends and in a perfectly lawful manner, may yet be actionable if immediately inspired by an improper motive. Thus a strike lawfully conducted to strengthen the union may still constitute a tort against a non-union man if its motive is to secure his discharge. On this proposition of law is based the rule that the activities of labor organizations must have the direct purpose of improving the welfare of the members of the association, and may only incidentally, indirectly and perhaps unsubstantially affect a third uninterested party.

But these generalities do not help us much to appreciate the trend of the Maryland decisions. The law of the union is in its present state of uncertainty because of conflict of

[38] Connors v. Connoly, 86 Conn. 641, 45 L. R. A. 564; and note in L. R. A.

[39] Hitchman Coal & Coke Co. v. Mitchell, 172 Fed. 963; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500.

two generalities: "improving the welfare of the members" and the indirectness with which the interest of a third party is affected. The courts until very recently have been inclined by their training, by their leaning in the direction of the individualistic philosophy of freedom, towards protecting the rights of the third party, no matter how incidentally they may be infringed upon. It is fair to say that they did not truly understand the significance of unionism, the attempt to secure economic equality by strengthening the bargaining power of the laborers. Maryland law, of which the last case was decided in 1909, is still in this stage. In the Lucke case the court recognized no rights of the union to secure employment for its own members, but considered merely the technical right of the individual. In the Adt case the court might have justified its decision on certain forcible methods of the union, but it contents itself with unconditionally outlawing the boycott no matter what the actual economic conditions may be. Precedent is still supreme. In the Willner case, the last word on the subject, the court might possibly be said to have taken subconscious cognizance of economic forces, but in reality the decision in favor of the unions was reached by purely individualistic reasoning. It may be hoped in view of certain tendencies manifesting themselves in other lines of decisions that the Court of Appeals will in its next union case take a broader view of the province of law, but as the decisions now stand, though the results in all these cases are perhaps justifiable, the law is not in a satisfactory condition and Maryland does not deserve a position with the more advanced states.

Statutes Relating to Unionism.—The union label is now recognized as one of the useful, if not necessary, instruments of organized labor. The law on the subject is rather difficult and the decisions most conflicting; but the Maryland legislature of 1892 has relieved us of the necessity of anything more than a cursory sketch of the unwritten law. In the earliest cases the union label was defended by its advocates as a trade-mark. The majority of decisions, how-

ever, held that inasmuch as the union is not the owner, manufacturer or seller of goods to which the label is attached, the label is not a valid trade-mark nor entitled to protection or registration as such.[40] Rebuffed by the common law courts, the unions strove in equity proceedings to enjoin the counterfeiting and unauthorized use of the label. Here they were more successful, the courts viewing the label as union property. The courts declared that the concept of property should not be fixed, but progressive, developing with the growing society. Surely, therefore, the label is property. Witness the reasoning in a Maryland case in a lower court:

"The object and effect of this label, as used by plaintiffs on their associates, is to increase the value of their labor. . . . It will not be denied that every freeman has a property right in his own labor. . . . From this broad principle it is easy to develop the particular proposition, that an association of men who combine for the purpose of increasing, by legitimate means, the general demand for their common labor, have a property right in whatever lawful instrumentality they can succeed in creating and controlling for that purpose.

"If the combination for that purpose be legitimate, and the label itself as used be a lawful instrumentality and contains no fraudulent misrepresentation, the label is entitled to the recognition of a court of equity as a property right, and any fraudulent imitation of it will be suppressed."[41] The reasoning here employed is valid and convincing, but nevertheless this opinion is in conflict with most courts of the country which have refused to view the label as property in the absence of statute.

Not satisfied with this tendency in the Maryland law—for, of course, it was not authority since the case did not reach the Court of Appeals—the unions caused the enact-

[40] See Martin, Law of Labor Union, pp. 423-429, for a more detailed discussion with references.

[41] Cigar Makers' Union of Balto. v. Link. Baltimore Circuit Court, 1886; reported in 29 L. R. A. 202, note.

ment of the law referred to above, legalizing and protecting union labels.[42] The first section declares that "whenever any . . . union of workingmen have adopted, or shall hereafter adopt for their protection any label . . . announcing that goods to which such label . . . shall be attached, were manufactured by a member or members of such union, it shall not be lawful for any person or corporation to counterfeit or imitate such label;" and following sections declare such counterfeiting a criminal proceeding, enjoinable by courts of equity, and cause for damages. Registration of the label is also provided for. No case seems to have arisen under this statute; but in other states similar statutes have been attacked as class legislation, but without exception they have been upheld.[43]

There is, moreover, on the statute books a law which was passed in the interests of, if not as a direct political plum for, the labor unions which is absolutely and undeniably unconstitutional. It is the law[44] which directs the "public printer" to affix to all public printing the label of the International Typographical Union. Precisely similar ordinances and acts have been held unconstitutional in many Western States as in clear violation of the guarantee by the Fourteenth Amendment to the federal Constitution of the security of property under the due process of law clause.[45]

The final problem which the state has to solve with reference to unionism may under certain conditions become the most important of all. It is the reconciliation of the two quarrelling factions in any labor dispute or the prevention of the dispute itself. There are two main classes into which legislation of this sort falls, arbitration and conciliation, and each of these is again sub-divided into compulsory and voluntary methods.

In arbitration both sides, labor and capital, appear before

[42] Acts 1892, Ch. 357; Code 1912, Art. 27, Secs. 50–55.
[43] See note in 39 L. R. A. (N. S.) 1190.
[44] Code 1911, Art. 78, Sec. 9.
[45] See Miller v. Des Moines, 23 L. R. A. (N. S.) 815 (Iowa), and note.

an arbitral board, usually, though not always, composed of a representative of each contestant and a non-partisan chairman, and present their case. The board deliberates and hands down a binding decision. If reference to an arbitral board is compelled by the State, the arbitration is compulsory; if reference to the board is dependent upon the agreement of the parties to the dispute, the arbitration is voluntary. Purely voluntary arbitration is rarely found in present day statute books, for it has been found that state activity is entirely unprofitable in this method of industrial peace. Compulsory arbitration has been tried in Australia with varying results in the different states. It suffers from the fact that there is no settled theory of wages discovered as yet upon which the board can render its decision, which must accordingly be a compromise, a result not too favorable to the principle of collective bargaining. Compulsory arbitration would possibly be unconstitutional in the United States.[46]

Midway between arbitration and conciliation as a means of industrial peace is a hybrid form of endeavoring to force peace by an impartial investigation of the dispute and a full publication of the results of the investigation, both facts and conclusions. By providing publicity, this method seeks to inform public opinion of the true state of affairs, and by directing it against one contestant, to compel this contestant to yield in the controversy. This method usually occurs in legislation in company with voluntary arbitration or conciliation and smacks a little of each of these. It differs from the compulsory methods in that it relies upon the force of public opinion rather than on the physical sanction of the State. Properly administered it should be effective.

Compulsory conciliation, or perhaps more correctly compulsory investigation, is a logical development of the method of publicity. It seeks to prevent industrial unrest

[46] See, however, Wilson v. New (decided March 17, 1917) as lending some credence to the contrary view.

rather than to reconcile two contending parties. As successfully employed in Canada, workmen and employers before declaring a strike or lock-out must appear before a conciliation board and state their case in full. This board then gives its decision and award which, however, is not binding upon either party: the strike or lock-out may be consummated as though there were no decision. The findings of the board have, however, been meanwhile published, and public opinion is relied upon to prevent the party to whom the decision was adverse from carrying out its intent to strike or lock out. This scheme seems the one most suited to an American State and its success in Canada testifies to its worth.

The Maryland laws belong to the class of voluntary arbitration laws and one of them has the added provision for an impartial investigation. The first law,[47] passed in 1878, although it does not explicitly refer to strikes, provides that "whenever any controversy shall arise between any corporation incorporated by this State in which the State may be interested as a stockholder or creditor, and any person in the employment of such corporation, which, in the opinion of the board of public works, shall tend to impair the usefulness or prosperity of such corporation, the board of public works . . . shall have the right to propose to the parties to said controversy that the same shall be settled by arbitration"; and, upon the consent of the parties to the arbitration, the board is given the power to make a conclusive award. This law is only of antiquarian interest and, as far as I have been able to ascertain, has never been made use of in a labor dispute. It is of the most inadequate type of this kind of legislation.

The present law was first enacted in 1904, but was radically amended by an addition in 1916.[48] The early law gave to the then Chief of the Bureau of Statistics and In-

[47] Laws 1878, Ch. 379; Code 1912, Art. 7.
[48] Laws 1904, Ch. 671; Code 1911, Art. 89, Secs. 3–11, as amended by Laws 1916, Ch. 406.

formation power to mediate, arbitrate or investigate. Though still on the books, the provisions of this law have been repeated in a form so much more efficient in the 1916 amendment that the early law should be practically superseded. No description of this amendment could be more clear or concise than the text itself.

"It shall be the duty of the State Board of Labor and Statistics to do all in its power to promote the voluntary arbitration, mediation and conciliation of controversies and disputes between employers and employes, and to avoid resort to lockouts, boycotts, blacklists, discriminations and legal proceedings in or arising out of such controversies and disputes and matters of employment. In pursuance of this duty, the said board may, whenever it deems advisable, but subject to the approval of the Governor, appoint boards of arbitration for the consideration and settlement of such controversies and disputes, and may provide for the necessary expenses of such arbitration boards, and for such reasonable compensation to the members serving thereon as the said board may deem proper, not exceeding, however, the sum of five dollars per day for each member for each day during which such member is engaged in work upon said arbitration boards. The said board shall prescribe rules of procedure for such arbitration boards, and the said arbitration boards shall have the power to conduct investigations and hold hearings, to summon witnesses, and enforce their attendance through the ordinary processes of law in the cities and counties in which such arbitration boards may meet, subject to all the penalties for non-attendance to which witnesses in ordinary civil cases are subject, and in like manner may require the production of books, documents and papers and may administer oaths, all to the same extent that such powers are possessed and exercised by the civil courts of the State; and said arbitration boards shall make, report and publish findings for the settlement of such controversies and disputes. The said Board of Labor and Statistics shall itself have like power to conduct investiga-

tions and hold hearings, summon and enforce the attendance of witnesses, administer oaths, require the production of books, documents and papers, and make and publish reports and findings with respect to any and all matters covered by this section. Subject to the approval of the Governor, the board may appoint and designate a deputy, and fix his compensation, who shall be known as the chief mediator, and who, together with any assistants who may be assigned by the board, shall have in charge the execution of the provisions of this section, under the direction and supervision of the board. The chief mediator may act upon any board of arbitration, but in such event he shall receive no compensation therefor in addition to his ordinary salary." This law, providing as it does for arbitration, and if that fails for investigation and publication with very efficient means of administration, is about as good a law as could be hoped for. It might be argued, and the author does believe, that compulsory conciliation would be a more effective means of industrial peace, but the law as it stands is adequate. If it fails in its purpose, it will be because of the inevitable weakness of a law depending on public opinion for its sanction or because of a slackness in its administration.

CHAPTER III

The Workmen's Compensation Law

History.—The Workmen's Compensation Law occupies a peculiar place in the study of the labor law. It differs from the law considered in the last chapter in that it is the result of a definite policy of state activity and is not a growth of the common law. It differs from the statute law, which will be the subject of the following chapters, in that it is not an addition to, but an amendment of the common law. It is the only instance we have in the field of Maryland labor law of a deliberate wholesale repeal of a whole section of common law principles which were conceived to be antiquated and unsuited to modern industrial conditions, and the substitution for them of a new statutory system of law.

Maryland's experience with workmen's compensation laws has been peculiar and somewhat disconcerting. It was the first State in America to adopt this now almost universal social legislation, but it was decidedly not in the van in adopting a really satisfactory law, if indeed the present law is entirely satisfactory. Its priority in the field is perhaps explained by the horribly inequitable degree to which its law of master and servant, especially the harsh doctrines of assumption of risk and fellow-servant negligence, had developed.

The first act of 1902,[1] "conceived in ignorance and quickly forgotten," was an act to create a Cooperative Insurance Fund. The law was limited in scope, applying only to "coal or clay mining, quarrying, steam or street railroads . . . and any incorporated town, city or county engaged in the work of constructing any sewer, excavation or other

[1] Laws 1902, Ch. 139.

physical structure, or the contractors of any such town," etc., an estimated coverage of about ten thousand employees.[2] The act was what may be called a pseudo-elective compensation scheme, which will be treated at greater length in the following section. It provided that the employers covered should be liable for "death or injury caused by the negligence of the employer or by that of any servant or employee of such employer" unless they contributed to the insurance fund which was provided for by the statute. Half of these contributions, the amounts of which were set forth in the act, might be deducted from the wages of the employees. The only insurance provided was a benefit of one thousand dollars for the death of every employee occurring "in the course of employment and by causes arising therein." No provision was made for compensation for permanent or temporary injury, and in this respect the workman seemed worse off than before the passage of the law. The only principle of compensation which seems to have been accepted in full was the liability of the employer for the faults of his employees. The law was of questionable value as a piece of social legislation; its real value was as an opening wedge for future enactments.

This act remained in force for nearly two years, during which time it seems to have been well administered, though only five death benefits were paid out of it. The fund was protected from insolvency by the mutual insurance feature which was borrowed from Germany—practically the only sound feature which was obtained from the extensive experience of European countries. In 1904, however, in a case in the Court of Common Pleas of Baltimore City[3]—the act never came before the Court of Appeals—the law was held unconstitutional, not as abrogating the constitutional rights of the employer, as we would generally expect to-day, but as denying to the employee a jury trial when he

[2] See G. E. Barnett in 16 Quarterly Journal of Economics, p. 591.
[3] Franklin v. United Railways and Electric Co., reported in the Daily Record for April 29, 1904.

wished to recover for the negligence of the employer. "The act," said the court, "embraces cases where the death had been caused by the negligence of the employer, cases where there would have been clear right of action in the courts under existing law. It enacted that employers who had made the payments provided in the act should by such payments be exempted from further liability. The effect was . . . to take away from citizens a legal right which they had theretofore enjoyed, and which could be enforced by them in the courts, and also to deny them a right to have their cases heard before a jury." The court seems plainly in error in the first part of its decision, for it was decided as early as the case of Munn v. Illinois[4] that "a person has no property, no vested interest, in any rule of common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." As to the matter of a jury trial the question is more complex and difficult. Suffice it to say that jury trial is not abrogated if the act is a just exercise of the police power; and, moreover, most courts in the case of pseudo-elective acts have refused to take cognizance of the implied coercion in these acts and have decided that where those affected have consented to be governed by the law there is no deprivation of due process. That is to say that where parties have consented to try their case without the intervention of the jury, even though there is insidious, hidden coercion pressing upon them, there is no infringement of their right to a jury trial. Such argument is of little value and is perhaps contrary to Maryland precedent, but the courts, in spite of criticism,[5] have often used this species of reasoning.

In 1910 the void created by this decision was filled with a new cooperative relief fund,[6] but even further limited

[4] 94 U. S. 113–134.

[5] See Freund, Constitutional Status of Workmen's Compensation, in 2 American Labor Legislation Review, 43 (1912). In the present (1917) Maryland law the servant has reserved to him the right of a civil suit when the employer is negligent.

[6] Laws 1910, Ch. 153, as amended by Laws 1912, Ch. 445.

this time to clay and coal mining in Alleghany and Garrett counties. The act provided a compulsory, cooperative insurance scheme; but the constitutional difficulty caused by the earlier decision was obviated by allowing the employee to sue in the courts provided he renounced all and had accepted no benefits from the Relief Fund. Another constitutional question was avoided by calling the contributions of the employers and employees "taxes," thereby resting the compulsory power exercised by the State upon its taxing rather than upon its police power. The advisability of the change may, however, be considered doubtful—a leaping from the frying pan into the fire, for here the constitutional provision against levying a tax for a private purpose stands rather obtrusively in the way, but it may be said here that such a tax has been upheld in a Western court as analogous to a license tax.[7]

This act, in spite of the constitutional change of face, was quite an improvement over the former law from a social viewpoint. It provided, as intimated, for a fund equally contributed by employer and employee—though for administrative purposes the employer paid the whole tax—which was put into the hands of the county commissioners of the two counties to administer. The insurance for "injuries sustained in the discharge of duty" and for death are far from sufficient, but there is a great increase over that provided in the original act. $1500 is granted to dependents upon the death of the wage earner; total disability entitles the injured to $750 plus one dollar a day, excluding Sunday, for twenty-six weeks, about $180 additional; partial disability entitles him to $375 with the same addition; and temporary disability to the dollar a day benefit for twenty-six weeks. The waiting time in all cases is one week. Although the law provides for the payment of all benefits in lump sums, the legislators recognized the possi-

[7] See State ex rel. Davis-Smith Co. v. Clausen (Wash.), 117 Pac. 1101. The Maryland law was upheld in analogy to this case, see 128 Md. 564.

ble evil of this method and strove to mitigate it by constituting the county commissioners a judicial board, first, to determine who were "dependents" and, second, to appoint bonded personal representatives to administer the reliefs granted to the beneficiaries. This law seems to have been successful, and its effectiveness was only terminated by the passage of the present general compensation act.

Again in 1912 there was introduced before the legislature a Workmen's Compensation bill, this time general and compulsory in character. When the bill finally emerged, however, it had been completely emasculated and converted into a harmless, inactive elective compensation law.[8] This provided that it should "be lawful for any employer to make a contract in writing with any employee whereby the parties may agree that the employee shall become insured against accident occurring in the course of employment which results in personal injury or death, in accordance with the provisions of this act; and that in consideration of this insurance the employer shall be relieved from the consequences of acts or omissions by reason of which he would without such contract become liable." Being purely elective, no constitutional questions could arise from the enforcement of this act. Moreover, the law has been entirely inoperative and is only interesting as the direct forerunner of the present law.

The act of 1912 covered all injuries "arising out of and in course of employment" except where the injury "is the result of the employee's intoxication, or wilful and deliberate act or deliberate intention to produce such injury." The dependents are defined to be "widow, widower, father, mother, son or daughter" unless otherwise provided. Nothing is said with regard to alien dependents. The schedule of benefits, although still rather meager, is again an improvement over the 1910 Act, and is again topped by the present act. It provides for a death benefit of thrice the

[8] Laws 1912, Ch. 837.

annual wages, but not less than one thousand dollars; in case of total disability for a benefit of at least fifty per cent of the wages during disability; and in case of partial disability for the difference between the total disability benefit and what the injured man can earn. The waiting time is again one week. The administration is vested in the parties to the contract, but the insurance commissioner has full powers of investigation. In case of any dispute as to award, a board of arbitration is provided for.

These three early laws were repealed by the passage of the 1914 Workmen's Compensation Law,[9] which embodied many of the best features of the earlier laws, especially of this last elective Employers' Liability Law. The new act, however, is such an advance over these experiments that a comparison between them is hardly profitable. It will be better, therefore, carefully to examine and analyze this law as a piece of social legislation in comparison with certain ideals which have been formulated for compensation schemes and in comparison with the various compensation schemes embodied in the laws of other states. After this study, it will be necessary to consider the legal aspects of the act.

The Present Law as Social Legislation.—It seems hardly necessary at this late date to enter upon any detailed argument with reference to the merits and demerits of workingmen's compensation laws. It is, nevertheless, almost impossible to begin any discussion of this legislation without at least some short summary of the pros and cons of the question.

The objections to the laws are based upon the common law individualistic conceptions of responsibility. An individual, it is argued, should be responsible only for his own fault and negligence. By the common law the employer must supply the employee with a reasonably safe place to work in, reasonably safe materials and machines to work

[9] Laws 1914, Ch. 800; Code 1913, Art. 101.

with, and reasonably competent fellow-servants to help him in his work. If the employer complies with his duties and the employee is nevertheless injured, the loss must lie where it falls, for on entering an employment the employee assumes the risks of that employment, and visualizing the possibility of injury demands higher wages as a sort of insurance. When confronted with the proposition that the average workingman is by nature an optimist and neglects or is unable to insure himself, the individualist shrugs his shoulders and conveniently washes his hands of the improvident laborer. He quite as conveniently waves aside the inequality in the bargaining power of the two factors, and assumes that the employee is as capable of refusing undesirable employment as the employer is of refusing employment to the too pessimistic employee. The common law individualist, however, is stronger when he argues against saddling the employer with the burden of providing compensation for all accidents occurring to employees arising out of their employment irrespective of cause. This position is absolutely invulnerable unless it can be proved that the employer is in a position to shift the whole cost of the compensation to the trade and thence to society.

The arguments for compensation, on the other hand, attack the problem most successfully from the opposite, the social point of view. From this standpoint the indictment of employer's liability is complete. Unfortunately, we have no Maryland statistics, but it is safe to assume that her experience is not materially different from that of other States. In the first place, an enormous majority of the industrial accidents under the common law system of reparation go absolutely uncompensated. Out of a total of 694,212 injuries cited in the New York commissions' report, only 88,841 or 12.78 per cent were compensated; and even the fact that this total included minor injuries, at the most fifty per cent of all, does not materially vitiate the conclusion drawn. Moreover, when recovered—and the delay is often great and serious—the compensation is usually most inade-

quate, if not perchance superfluously generous. "A good deal to the very few and nothing or very little to most seems to be the principle upon which the liability system worked itself out."[10]

The common law doctrines of assumption of risk, contributory negligence and fellow servant negligence have also come in for their own special condemnation: the assumption of risk theory on the grounds explained above; the contributory negligence theory as being inequitable in thrusting upon the employee full liability for partial fault, in its essence a lazy rule of expediency; the fellow-servant doctrine as being totally inadequate in this day of enormous factories and multitudinous coemployees, many of them in entirely separated departments. Moreover, the hostility aroused under common law principles between the laborer and his employer by the consequent law-suits and bickerings is surely not conducive to economic peace and mutual understanding. Finally, and this argument being expressed in dollars and cents has always been most potent with the layman, the cost of administration, the lawyers' fees and the court costs, have annually mounted to intolerable figures. This was a direct burden both upon society[11] and upon the injured workingman who could ill afford the increased load. All of these defects of the liability system worked a hardship upon the laborer, generally causing him to lower his standard of living, if not to become an actual object of charity. To prevent this, to provide compensation for every injury when most needed, to save lawyers' fees, to promote amicable relations between the employer

[10] J. M. Rubinow, Social Insurance, p. 94. This book is rich in statistical matter. Another valuable piece of statistical work is contained in the congressional report on compensation, in S. Doc., vol. 12, 62d Cong. 2d sess.

[11] There is some argument that the cost of administration of the compensation law, the salaries of the commission and its other expenses, will be as great as, if not greater than, the saving accomplished by the diminution of court work. This argument, even if true, can weigh little; for it is not the cost of government which the compensation laws are striving to effect, but the social cost of incapacitated, degraded workingmen.

and the employee, these are the aims of compensation. To put upon the consuming public the duty of preventing poverty instead of mitigating wretchedness.

The arguments are clearly in favor of compensation; yet the inevitable lag of legislation, the opposition, entirely explicable, of the capitalist class to any social legislation which will affect their pocketbooks,—and all social legislation must necessarily affect their pocketbooks in the first instance, though the intention is that part, at least, of the burden shall be shifted,—the technical shortcomings of the average state legislature; these have kept Maryland for twelve years with insufficient compensation laws on her statute books.

The Maryland act of 1914, however, provided for a compulsory system of compensation insurance in certain enumerated extra-hazardous employments.[12] The legislature flatly challenged the constitutional obstacle of due process of law by making the law absolutely compulsory for those employments to which it applies. This system of absolute compulsion is in complete accord with theoretical opinion, but in almost as complete contrast to the actual performances of various States. Only four states out of twenty-four, that is, Maryland, New York, Ohio and Washington, have compulsory schemes. The others have sought to appease the courts with what I have denominated in this discussion pseudo-elective schemes. These latter laws are purely elective, though often with a presumption of election unless notice to the contrary be given; but those employers who fail to elect are penalized by being deprived of the defenses of assumption of risk, fellow-servant fault and contributory negligence, and burdened with the added disadvantage of popular disapprobation in the jury trial which must take the place of compensation proceedings. The employee who does not elect is left in the same position as he was before the passage of the act. That is to say, the law

[12] Sec. 32 as amended by Laws 1916, Ch. 597. See also American Ice Co. v. Fitzhugh, 128 Md. 382.

states in effect first to the employer: You are perfectly free to choose whether you will come under the compensation scheme or remain under liability principles; but, if you do not choose the new compensation, you will be deprived of your three common law defenses and the jury will hardly be disposed in your favor. Then to the employee: You have the same choice; but, if you do not take up with our plan, expect no favors from us. The courts see no coercion in this. The end attained by this system is practically the same as that reached by the compulsory system, but in a clumsy manner. The pseudo-election has been a sop to the courts, which have refused to see any deprivation of due process to him who has chosen to be so governed. The subterfuge has been successful, but the courts have opened themselves, and rightly, to the charge of inconsistency, a quality which, interesting as it may be in other fields, is deadly to the law.[13]

The Maryland law, as has been said, enumerates the extra-hazardous employments which are covered, making provision, however, in a blanket clause for all hazardous employments not specifically enumerated. The presumption, therefore, is that any dangerous occupation is covered by the act. On the other hand, "farm laborers, domestic servants, country blacksmiths, wheelwrights and similar rural employments, casual employees, and any employee whose salary exceeds $2000 per annum" are specifically excluded.[14] Practically the same exclusion exists in all States, sometimes by explicit exclusion as in Maryland, as often by limiting the application of the compensation scheme to those establishments employing more than four or five workmen. This exclusion is usually justified upon the grounds of administrative expediency, but it is also true that the conditions in these employments are still practically the same as they were before the Industrial Revolution and therefore do not so forcibly demand an amendment of the

[13] Freund, 2 American Labor Legislation Review, 43.
[14] Sec. 63.

law of that period. In addition to the enumerated list of employments, the Maryland law provides a joint elective system of compensation for all other employments in the State.[15] That this provision will be often elected seems doubtful.

The provisions for compensation[16] in the Maryland law cannot be rated as high as can the general scheme. The increased cost of casualty insurance to the employer has been such a deterrent upon the legislators that they have failed rather completely to enact wisely and sufficiently. The sudden increase of burden upon the employer which must necessarily accompany compensation has indeed been the real obstacle in the path of these laws; yet, if we correctly understand the theory of compensation, this increased cost is no real objection.

It has been long ascertained that one of the foremost causes of poverty is the death or disability of the wage earner of the family. Poverty was not originally looked upon as a social disease and the natural remedies for it were individualistic in character. The supremely moral and provident device of "setting aside for the rainy day" was the panacea for all poverty. It proved hardly a feasible social cure for families stricken by an industrial accident. The average workingman is naturally optimistic and rarely visualizes the risk of his employment. Cooperative societies, furnishing social inducements as well as fraternalistic benefits, were devised by the master minds to cure to some extent this insidious evil. By distributing the risk, these societies offered a degree of security at a low rate. The remedy, however, was not complete; for these societies, which developed into gilds and finally into the modern labor union, naturally did not include the entire working population. The outsiders still possess, of course, the old resource of self-insurance, "putting aside for the rainy day," as well as the newer idea of insurance in an organized insurance

[15] Sec. 33.
[16] Sec. 36, as amended by Laws 1916, Chs. 368, 597.

company. The newer plan, it would seem, is no more practicable than the older, for the workingman is naturally indifferent to insurance, especially at the high rates which his accident risk would generally bear. This antipathy, or at least apathy, toward insurance is overcome in the case of the labor union by the added fraternalistic advantages and by the attraction furnished by the increased utility of the union as a fighting machine, advantages which seem from the viewpoint of insurance of rather doubtful value because of the decrease in the security of the insurance funds. But, accepting cooperative insurance at its greatest value, society still has on its hands those poverty stricken families whose uninsured wage-earners have been incapacitated or killed by industrial accidents and those families, no less numerous, which have suffered a serious set-back in their standard of living because of insufficient insurance. Viewed, then, as social legislation and totally excluding from consideration the equities of the matter, compensation laws, providing funds to tide over all accidents and to support the dependents of killed workmen, are conceived to offset and to forestall this important cause of poverty. Society is to foot the bill and employers are expected to shift the burden which is primarily placed upon them. It is perfectly possible to argue, though it is doubtful whether the employer will enthusiastically agree with the argument, that the employer should invite a large increase in insurance rates, for it has often been demonstrated that the producer can be assured of much greater success in shifting large increases in the cost of production than small increments.

Washington is the only State in the Union, however, which has interpreted the dictum of social insurance literally. Her compensation law provides for the care of dependent widows and injured workmen on the same plan that poor relief would be granted, though, of course, on a more generous scale. Upon death, the widow is to receive twenty dollars a month for life or until she marries, with five dollars additional up to thirty-five dollars for each child under

sixteen. For total disability, the injured employee receives twenty dollars a month if unmarried, twenty-five if married, and five dollars additional up to thirty-five dollars for each child under sixteen. The compensation lasts during disability. In its other provisions the Washington law departs somewhat from this principle; but, though the compensation is somewhat low, what has been set forth sufficiently illustrates the theory of social insurance—the prevention and abolition of poverty—which has been developed in Washington.

Most of the States, however, have met the problem by providing compensation commensurate with the previous earning power of the wage-earner.[17] The accidents are divided into three classes, those resulting in death, in total disability, and in partial disability; and a different rate of compensation is provided for each. The tendency, though unjustifiable on theoretical grounds, has been to divide the class of partial disability into various categories and assign a definite compensation to each kind of injury. The just method would be to compensate the injury by a payment proportionate to the loss of earning power, but the categorical method has been made use of in order to lend certainty to the amount and cost of insurance. The table on the next page shows Maryland's standing as to the rate of compensation in comparison with other industrial States.

Maryland, it is evident, ranks low compared with these other selected States. In the matter of death benefits the comparison is most favorable to Maryland, but this is merely because the other States are equally delinquent, not because Maryland is nearer the standard. New York is the only State which recognizes that the needs of a widow with children are greater than those of a widow without children. Maryland is prodigal towards the small family of dependents and penurious toward the larger one. This

[17] Provision is made in Maryland (Sec. 47) as in some other States for a consideration of the possibility of increase of earning power when the injured workman is a youth.

	Standards[18]	Maryland	New York	Ohio	Wisconsin	Massachusetts
Death						
To widow	35%	50%	30%	66⅔%	65%	66⅔%
To children	25% or 10% additional[19] to 66⅔%	416 weeks, $1,000–$4,250	15% or 10% additional up to 66⅔%	312 weeks, $1,500–$3,750	Limit: 6 times annual wages	500 weeks, $4,000
Total disability	66⅔%	50%	66⅔%	66⅔%	65%	66⅔%
Limit of payment	$5–20 per week	$5–12	$5–15	$5–12	....	$4–10
Limit of time	....	416 weeks	....	....	4 times annual wage	500 weeks
Partial disability[20]	66⅔% dif.	50% dif.	66⅔% dif.	66⅔% dif.	65% dif.	66⅔% dif.
Limit of payment	$5–20 per week	Up to $12	$5–15	Up to $12	....	Up to $10
Limit of time	....	$3,500	$3,500	$3,750	4 times annual wage	500 weeks
		50%	66⅔%	66⅔%	65%	In add. 66⅔% for:
1. Hand	....	150 weeks	240 weeks	150 weeks	160 weeks	50 weeks
2. Arm	....	200 "	312 "	200 "	160–240 "	50 "
3. Foot	....	150 "	205 "	125 "	120 "	50 "
4. Leg	....	175 "	288 "	175 "	160–240 "	50 "
5. Eye	....	100 "	128 "	100 "	160 "	50 "

[18] Furnished by the American Association of Labor Legislation.
[19] The first child is to have 25 per cent if there is no surviving parent.
[20] The compensation is for the loss in earning power (Dif) except in scheduled injuries.

is clearly unjustifiable legislation. Moreover, this law abruptly discontinues at the end of eight years the stipend which only too often had been just sufficient to support the widow or widower. This is hardly socially or economically sound unless based on statistics of the average length of life of a widow after the death of her husband or unless the Maryland legislature wished by enactment to spur the widow on to a second marriage.

The Maryland provision for total disability is entirely inadequate. An injured, incapacitated workman is, on grounds of abstract justice, entitled to his whole salary during incapacity. This, however, is an extreme and perhaps an inexpedient position. Some reduction has to be made chiefly to prevent malingering, but also to satisfy the practical sense of the community. In one European country, however, eighty per cent of the workingman's former earning capacity has been granted and found expedient, but in America sixty-six and two thirds per cent has been deemed sufficient. Maryland provides for only fifty per cent. More serious, however, is the limitation of even this compensation to eight years unless the laborer by dying precludes the limitation becoming an injustice. There can be no justification for thus terminating the compensation. These laws are framed to prevent poverty, not to postpone it for eight years.

The provisions for partial disability are perhaps less justifiable than those for total disability. Compensation for partial disability in Maryland is divided, as intimated, into two classifications: temporary partial and permanent partial disability, and the latter is subdivided into smaller categories. The division is entirely useless and very confusing. The compensation for temporary partial disability is fifty per cent of the loss of earning power due to the injury, the total compensation not to exceed $3500. If, however, the same injury—and it is not impossible to conceive one—should be classed as a permanent partial disability not covered by the special schedule, the rate of compensation is the

same as that just given, but the maximum is reduced to three thousand dollars. An impasse, it seems to me. The specified schedule, as will be seen from the table, seeks to put a special price, based upon fifty per cent of the weekly wage, upon certain enumerated injuries. As was said above, these schedules are justified merely as an insurance device; as a social preventive they are unjustifiable. They would admit that a man is incapacitated by the loss of a member and needs compensation. However, in two or three years, it is to be assumed he will have recovered and have completely adjusted himself to his new mode of working, being able to earn sufficient to support himself and his family at a standard little below his former standard of living. It is absurd. Can a machinist who has lost his hand earn nearly what he has been accustomed to earn? Is a structural steel worker who has lost a leg a capable workman? The only just compensation is a percentage of the loss of earning power during the disability; yet no American State has provided unlimited compensation. Massachusetts is the most exemplary, for besides providing a compensation of two-thirds the loss of earning power during ten years, it recognizes the fact that the injured laborer will be in greater need during the first year of his injury by providing a compensation of two-thirds his wages for this year, after which the regular compensation runs. In this section more than in any other the Maryland law is inadequate and in need of amendment.

Another feature of the law which must be considered in connection with the compensation provisions of the act is the section dealing with what is technically known as the "waiting period."[21] In order to prevent malingering and to exclude those innumerable minor injuries which it is inexpedient to compensate, all compensation laws specify a period before which no payments are granted. The standards adopted in this study specify from three to seven days;

[21] Secs. 49 and 36 (1).

but, though in some European countries the shorter time is made use of, the prevailing practice in the United States is to enforce a waiting period of fourteen days, though in a few States it is only seven days. The Maryland law provides for a waiting period of fourteen days except in the case of total disability when the workman waits only seven days. During this waiting period the only outside help provided for the injured employee in most acts is medical and surgical aid.[22] In Maryland the employee is entitled to this aid at the expense of the employer up to the amount of one hundred and fifty dollars, so that it may continue longer than the waiting period if necessary.[23]

In most States the compensation provided in the sections just discussed is the sole remedy of the workingman. In Maryland, however, on account of the constitutional difficulties previously set forth, whether sound or not, it is provided that "if the injury or death results to a workman from the deliberate intention of his employer, the employee or his widow . . . may have a cause of action as if this Act had not been passed."[24] Except in such a case the employee or his dependents,[25] upon proper notice to his employer[26] and upon periodic medical examinations[27] is entitled to his compensation and he is absolutely forbidden to surrender this right by any contract.[28]

[22] It is sometimes argued against the long waiting period that the low paid laborer may be forced below the subsistence line in the first month of his injury and never again be able to pull himself above it. E. g., a laborer, with a family of four, earning twelve dollars a week, is injured. His total compensation for the first month of his injury will be just equal to his former weekly wage. The argument is strong, but seems outweighed by considerations of expediency and of penalizing improvidence.

[23] Sec. 37, as amended by Laws 1916, Ch. 597.

[24] Sec. 45.

[25] Non-resident aliens are included. Sec. 36, as amended by Laws 1916, Ch. 368.

[26] Sec. 38.

[27] Sec. 42.

[28] Sec. 53. A recent decision of the Massachusetts Supreme Court has stated that the compensation provided in the act does not relieve the employer from liability to the parents of a minor for loss of service. (King v. Viscoloid Co., 106 N. E. 988.) It seems hardly

The compensation is paid for disability or death "resulting from an accidental personal injury . . . arising out of and in the course of employment without regard to fault as a cause of such injury" and "such disease or infection as may naturally result therefrom." However, "where the injury is occasioned by the wilful intention of the injured employee to bring about the injury to himself or another, or where the injury results solely from the intoxication of the injured employee," no compensation is recoverable.[29] This or a similar section has given rise in every State to an immense amount of litigation, but it will not be necessary to delay longer here than to quote the definition adopted by the Maryland commission:

"An injury is received in the course of employment when it comes while the person is doing the duty which he is employed to perform. It arises out of the employment when there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of employment. But it excludes an injury which cannot fairly be traced to the employment as a con-

possible that such a decision could occur under the Maryland law. The Massachusetts law is a pseudo-elective law and provides only that unless the employee shall have given contrary notice, he will be assumed to have surrendered his rights to any recovery outside the law. This, says the court, does not abrogate the parents' right of recovery for it is a "rule of statutory construction that an existing common law right of action is not to be taken away by a statute unless by direct enactment or necessary implication." In the Maryland act, however, it is provided that the common law rule "that statutes in derogation of the common law are to be strictly construed shall have no application to this act" (Sec. 61); and, moreover, that payment under the act "shall be in lieu of any and all rights of action whatsoever against any person whomsoever" (Sec. 36).

[29] Secs. 14 and 63 (6), as amended by Laws 1916, Ch. 593. See also American Ice Co. v. Fitzhugh, 128 Md. 382.

tributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."[30]

It may be noted here that, since the compensation law does not cover occupational diseases, Maryland is without any legal remedy for this industrial evil, for under the common law doctrines it would be practically impossible to recover from the employer in the courts. The legislative principles upon which these diseases are excluded from the operation of this act are perhaps sound, but some provision should be made in a separate act for compensation of the incapacitated. It is obvious that the same reasons which demanded the passage of the compensation law, the social and individual effects of uncompensated injuries, as loudly call for an act whereby the diseases inevitable to the occupation should be borne by the occupation. Practically every European country has a law of this kind, but the acceptance of the principle has been slow in this country.

The provisions of the law which have been considered are, of course, those most important to the laborer. It is, unfortunately, this part of the Maryland law which is most deficient. However, a law is not a law until it is administered, and it is, therefore, of utmost importance to the beneficiary of the act that its administration be efficient. Fortunately, the sections of the Maryland act dealing with the administration and insurance are most complete and most satisfactory.

The greatest necessity, after once establishing the true compensation principle, is to provide some method of guar-

[30] Claim No. 224, quoting from McNichol v. Emp. Lia. Ass. Co., 215 Mass. 497.

anteeing the payments to the injured employee. It is easy to conceive of a compensation law totally invalidated by the inability of the employers to make sufficient payments after the accident because of insolvency or other unforeseen difficulty. Some European countries have passed laws without any provision for the securing of the compensation, leaving everything to the individual initiative of the employer; but in the United States it has been unusual not to compel some kind of insurance. In Maryland, under a heavy pecuniary penalty and the added disadvantage of the abrogation of his three common law defenses in any suit arising during the time of his non-coverage,[31] the employer is compelled to secure the compensation due from him either by insuring in the State Accident Fund, in an old line casualty insurance company or mutual insurance association authorized to carry workmen's compensation insurance and under the supervision of the insurance commissioner, or by convincing the State Industrial Accident Commission that he is strong enough financially to carry his own insurance.[32] The Industrial Accident Commission has wide powers of inquisition and compulsion with reference to the methods which the employer shall adopt; and the state insurance commissioner has authority to determine the adequacy and to regulate the compensation rates of the private companies.[33]

The State Accident Fund is a creature of the act.[34] Full permission is given to the commission to establish this fund by the underwriting of insurance policies under the act. The Maryland fund is in the nature of a straight insurance scheme as contrasted with the compulsory, state-administered mutual insurance fund of the Ohio act. The rules for its administration, and its actual administration, are based upon the experience and organization of private in-

[31] Secs. 14 and 15.
[32] Secs. 15, 29, and 30.
[33] Sec. 15, as amended by Laws 1916, Ch. 597; and Sec. 29.
[34] See Secs. 16–28, as amended in 1916.

surance companies. Full power to make rates and classifications conducive to accident prevention is granted. Penal provisions allow the state fund to enforce certain regulations as to uniform payrolls or payroll reports which the private companies enforce by cancellation. As practically conducted, the fund does not solicit policies; and it has thus been able to quote rates on the eight or nine hundred policies which it had underwritten at the end of 1916 ten to thirty per cent lower than the private companies. This saving is also due, in part, to the fact that for the first three years the full cost of administration is borne by the State; and, even after the first three years, the fund is only to bear that part of the expense which is proportionate to its share of the policies written in the State.[35] It is, of course, impossible to give prior to the lapse of a period of five or possibly ten years an opinion of any value on the efficiency or economy of the state fund. A principal objection to such a fund is that, being unable to refuse any policy, it is overburdened with bad risks. Another objection is that the reserve is generally insufficient to cover catastrophe risk, though in Maryland, it would seem, the entire resources of the State are behind the fund.[36] Both of these as affecting the possibility of the passing of payments are of utmost importance to the employee, more so perhaps than to the employer.

The objections to the Maryland fund, it is obvious, are due to the fact that it is elective and in competition with the private companies. This fact has led other States, notably Ohio and Washington, to create a monopoly of insurance in the state fund. The savings in administration would seem a convincing argument for this mode of security, if efficient administrative officers could be procured for the state fund and the fund in its entirety could be kept out of politics. This, of course, is socialistic legislation, and encounters the opposition that is the natural concomitant

[35] See Sec. 27, as amended by Laws 1916, Ch. 597.
[36] Sec. 16, as amended by Laws 1916, Ch. 597.

of all socialistic enterprises. In Maryland, especially, this opposition would be strong and effective because of the great growth of Baltimore as a center of casualty insurance companies and the consequent disruption of business which would of necessity ensue.

The law as a whole is administered by the State Industrial Accident Commission, composed of three commissioners appointed by the governor of the State for a term of six years with an annual salary of five thousand dollars.[37] Provision is made that this commission shall be bi-partisan, but there is no attempt to secure efficient administration at the cost of party politics. The commission has the employment of upwards of fifty clerks, actuaries, etc., with no supervision except the written approval of the governor to the salaries: competitive examinations are not mentioned. During the administration of each governor the terms of at least two of the three commissioners will expire so that each governor will be able to change completely the political complexion of a board which will annually spend forty thousand dollars or over. Whether party politics is going to spoil another good legislative endeavor, it is, of course, impossible to prophesy; but it seems unpardonable that a more efficient check than public opinion was not provided in the law.

The principal, and, at this time,[38] the only, office of the commission is in Baltimore City; but, when it is more convenient for one of the commissioners to go into another part of the State to hold a hearing than it is for the claimant with all his witnesses to travel to Baltimore, advantage is taken of the provision allowing one commissioner to hold hearings and make awards subject to the approval of his

[37] Secs. 1 and 3. Three thousand dollars only of the salary is paid by the State, because of the provision of the Constitution against appointive officers with salaries above three thousand dollars (Art. 15, Sec. 1). The other two thousand dollars is paid by the City of Baltimore, a practice which has been recently approved by the Court of Appeals with regard to the Public Service Commission in Thrift v. Laird, 125 Md. 55.

[38] 1916.

colleagues. The normal course of proceedings, however, is for the entire inquiry to be conducted at the home office by the commission as a whole. When due notice has been given of an accident and the fourteen waiting days have passed, during which time the injured laborer has been enjoying medical treatment, the commission sets a date five days in advance, before which any objection to the payment of the claim must be made and a hearing requested. Unless there is objection the claim is paid, for there is specifically declared to be a strong presumption that "the claim comes within the provisions of the act, that sufficient notice was given, that the injury was not occasioned by the wilful intention of the injured employee to bring about the death or injury of himself or another, and that the injury did not result solely from the intoxication of the injured employee while on duty."[39] It is in these summary cases naturally that the principal economies of the law become apparent.

If the employer demurs to the employees' claim, a hearing is set. The hearing is held either before the Accident Commission or before a special arbitration committee appointed by it.[40] Until a large body of precedents is built up it is not expected that a special arbitration committee will be often appointed. At these hearings the commission prefers to have each party represented by an attorney, so that the case will be presented in an orderly manner. Here becomes apparent one of the points where, in the practical operation of a compensation law, it departs radically from its ideals of no lawyers and no hostility between capital and labor. The proceedings of the commission are, however, most summary in their nature. There is no pleading; common law rules of evidence do not prevail.[41] Only one of the present commissioners is a lawyer, and the commissioners often question the witness in order to bring out what

[39] Sec. 62.
[40] Sec. 40.
[41] Secs. 9–10.

seem to them essential points. The proceedings should be equitable rather than legal in nature has declared a Massachusetts court in a recent decision.[42] In all investigations the commission has "power to issue subpoenas, compel the attendance of witnesses, . . . compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony," and an immunity bath is provided against self-incrimination to save the constitutionality of the statute.[43] Every precaution is taken to secure swift and adequate justice and to make this board, though quasi-judicial in its procedure, executive in its action. The powers of the commission do not cease upon each award, but continue like the powers of equity courts over their trustees and guardians: it may at any time upon due cause and notice amend its awards and decisions.[44]

"Any employer, employee, beneficiary or person feeling aggrieved by any decision of the commission affecting his interests under this Act may have the same reviewed by a proceeding in the nature of an appeal" in any common law court having jurisdiction; "and the court shall determine whether the commission has justly considered all the facts concerning the injury, whether it has exceeded the powers granted it by the Act, or whether it has misconstrued the law and facts applicable in the case decided." This appeal also is to be conducted in a summary manner, but, upon motion of either party, any question of fact involved may be submitted to a jury. Appeals from these proceedings lie to the Court of Appeals.[45]

This exposition of the principles of the act demonstrates that it is a piece of legislation passed for the benefit of the laborer; and, insufficient and unsatisfactory as some of its

[42] In re Mut. Liability Ins. Co., 102 N. E. 693.

[43] Sec. 7. Contempt of any of these orders may be punished upon application to any judge in Maryland.

[44] Sec. 54. Construed in Adleman v. Ocean Accident, etc. Corp., 130 Md. 512.

[45] Sec. 56. See also Breuner v. Breuner, 127 Md. 189; Frazier v. Leas, 127 Md. 572.

provisions have been found to be, it brings about a great improvement over previous conditions. Besides its effect as social legislation, however, certain legal results follow from its enactment.

The Constitutionality of the Law.—From the legal standpoint, the most interesting feature of a compensation law is its constitutionality. Frankly considered, the law requires that the money of one set of people shall be handed over irrespective of fault to the members of another class upon the happening of a contingency. Such a law is a new departure in American legislation and presents some extremely interesting constitutional questions. Numerous arguments, brilliant and intricate, have been published in support of the constitutionality of the law, so that here there is need only of a mere outline of the difficulties.

The fact that the compensation law substitutes vicarious liability without reference to fault for the old common law liability is thus met: "Our jurisprudence affords many examples of legal liability without fault and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. . . . Other examples are afforded in the liability of the husband for the torts of his wife—the liability of a master for the acts of his servants."[46] Statutes furnish further examples. Municipalities have been made responsible for property destroyed by a mob;[47] railroads have been made liable for damage caused by sparks from its engines.[48] But these precedents are not precedents for the compensation law. The common law instances cited are merely the result of imputing to one the fault of another whose action he controls, and the statutes relate to special objects of state activity. Compensation laws, on the other hand, make an innocent employer carrying on a private, lawful business liable even for an accident occurring in the course of that business. This

[46] Chicago, R. I. & R. R. Co. v. Zernicke, 183 U. S. 582.
[47] Chicago v. Sturgis, *222* U. S. 313.
[48] St. Louis, S. F. R. Co. v. Mathews, 165 U. S. 1, and numerous state decisions.

argument through precedents does not lead to very satisfactory conclusions.

Another argument seeks to uphold the compensation law upon the basis of the decision in the Second Employers' Liability case.[49] This decision held that it was within the power of Congress so to change the rules of law that no railroad could avail itself of the three common law defences of assumption of risk, contributory negligence, and fellow-servant doctrine in a damage suit against it by an employee. The decision merely reiterated the old opinion that there can be no property in a rule of law.[50] To try to base the constitutionality of the compensation law upon this decision displays an ignorance of the distinction between that law and an employers' liability law. The liability law merely abrogates the three common law defences and leaves the law of industrial accidents otherwise the same; the compensation law provides for the indiscriminate indemnification by an administrative tribunal of all industrial accidents. The liability law retains the idea of fault; the compensation law imposes a vicarious liability.

A final case relied upon—and this time with more justification—is the bank guarantee case.[51] Here the court held constitutional a law which ordered all state banks in the State of Oklahoma to contribute to a guarantee fund from which were to be paid the losses sustained by the depositors in any state bank by its insolvency. Here property is taken from one set of people to be handed over to another set upon the happening of a contingency for which the first set is often without fault. In this respect this law is exactly similar to a compensation law, and this case, especially in view of the broad language used by Justice Holmes, is most aptly referred to as a precedent and an analogue in arguing the constitutionality of a compensation law. But a distinction can be drawn. In the first place, banking is

[49] Mundou v. N. Y., N. H. & H. R. Co., 223 U. S. 1.
[50] Munn v. Illinois, 94 U. S. 113.
[51] Noble State Bank v. Haskell, 219 U. S. 104.

peculiarly a subject of state control; it is most highly "affected with a public interest." In fact, it is really a public business entrusted to private enterprise and almost any regulation in furtherance of the public welfare would be justified. In the second place, there is a decided community of interest among bankers which tends to make them stand together and be somewhat responsible for the acts of one another, so that the law merely lends the sanction of the state to what was before demanded by self-interest. It might be argued that a compensation law creates a community of interest among employers in the promotion of safety, but this is a difficult argument, and there is of course no special public interest in most of the occupations covered by a compensation law. Therefore, though the bank guarantee case is a weighty precedent, it does not seem to be absolutely conclusive.

If a compulsory compensation law is to be frankly upheld, it will have to be upheld as an exercise of the police power. It was in the exercise of this power that the Maryland act was avowedly passed.[52] "'Property of every kind —it must be remembered—is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which every one may use his property.'"[53] It is in pursuance of this power, as was said in the first chapter, that all labor legislation is enacted and, if we consider the previous, admittedly constitutional labor enactments, it will be easily demonstrated that the compensation law is merely a peculiar development of a well-established principle.

Since the Industrial Revolution, the bargaining power of the laborer has not been equal to that of the employer. The inequality was early recognized by the legislatures and

[52] See the preamble, Part 4.

[53] Windsor v. State, 103 Md. 611, quoting Story on the Constitution. See also Singer v. State, 72 Md. 464; State v. Hyman, 98 Md. 596; 64 L. R. A. 637; State v. Gurry, 121 Md. 534; C. & P. Telephone Co. v. Board of Forestry, 125 Md. 666.

the courts too have now explicitly sanctioned the legislative correction of this inequality.[54] In pursuance of this policy of equalization, the legislatures have never seen fit to make absolutely equal the two parties to the labor contract, but have instead guaranteed to the employee certain terms of the contract which were conceived as necessary to the "general welfare and public convenience." Thus the legislature has passed child labor laws, hours of labor laws for men and women, safety and sanitation laws, and a host of other laws which are not so easy of classification. The compensation law is a law of this kind. Conceiving that the employee could not successfully bargain with the employer for a sufficient insurance to himself against industrial accidents, the legislature by its fiat introduced such an insurance term into every labor contract. That is to say, the law recognized that, as economists had long contended, the employee did not visualize all the risks of his employment, as the common law assumed he did, and demand a higher wage in consequence thereof. Therefore, says the law, an implied term of every contract shall be an adequate compensation in case of industrial accident.

That this term of the contract is as necessary to the general welfare as are the terms introduced by previous laws seems hardly to require detailed proof. Industrial accidents are undoubtedly the principal causes of poverty and degradation. If the prevention of poverty is not necessary to the general welfare of a community, what is? It is true that the courts, not however without criticism, have refused to sanction taxation for the prevention of poverty. But, granting the correctness of these decisions, they do not weaken our argument. By a compensation law the State does not tax for the prevention of destitution; it merely decrees that industry shall not prosper from the mishaps of the employee, just as it formerly declared that industry should not prosper from the labor of children. Industry must be conducted legitimately and it is certainly within

[54] Holden v. Hardy, 169 U. S. 366.

the power of the State to decree that industry shall bear the cost of all its materials, the cost of the life and limbs of its laborers, as well as of the inanimate equipment and raw stuffs.

In thus briefly outlining the constitutional difficulties which accompany a compensation law, it is of course impossible to consider the finer points of law. Equally impossible is it to examine some minor constitutional questions which may be raised with regard to the Maryland law, but which are not essential to the compensation principle.

From the practical legal standpoint, the most important result of the compensation law will be to render obsolete in the occupations covered all the intricate tort law dealing with the relation between employer and employee.[55] As has been so often iterated, the employer can no longer plead contributory negligence, the doctrine of assumption of risk, and the fellow servant doctrine in defense of a claim against him by an employee. The law of contributory negligence will continue to exist in other damage suits, but with this exception these doctrines will ultimately pass out of existence. With them will pass a mass of complicated and unsettled law. No longer will there be a question of what risks the employee assumes on entering an employment, of what kinds of instruments the employer must furnish, whether a defect in a machine is latent or patent, or whether the employer has engaged efficient fellow servants to work with the employee. No longer, in short, will it be necessary to enumerate the duties of the employer to the employee, for they will all become merged in one duty,—to compensate him for an industrial accident. No longer again will it be necessary to determine who are fellow servants, for the doctrine relating to them is also abolished. By an amendment of 1916 one of the elaborations of this rule is explicitly abrogated. If an employee of a subcontractor is injured he may collect his compensation directly

[55] See Harlan, Domestic Relations, Part V.

from the contractor in chief, who will then contest with the subcontractor the ultimate liability.[56] Thus, so far as the workingman is concerned, the doctrine of independent contractor and with it the doctrine of vice-principal is abolished.

In place of this branch of the law there is growing up a new series of cases deciding what is an accidental injury "arising out of" and "in the course of employment." This line of cases, if we can judge from present indications, threatens to become as long as those which have been overthrown by the act; but they will hardly result in such difficult law. I have already quoted the definition adopted by the Maryland Accident Commission.

Finally a change must be noted in the relation of the employee to the insurance carrier. Under the common law the insurance carrier bears no special relation to the employee; it was merely the indemnifier of the employer. Under the compensation law "the insurance carrier occupies the position of surety for the employer, to secure the fulfillment of any liability which may be determined to have arisen."[57] The liability of the carrier to the employee is a primary liability jointly with the employer, and it is not excused from payment of the compensation by the bankruptcy or insolvency of the employer.[58] Nor, of course, on the other hand is the employer relieved by insuring in a bankrupt or insolvent insurance carrier.

[56] Laws 1916, Ch. 597, adding Sec. 60A to the Code.
[57] Brenner v. Brenner, 127 Md. 189.
[58] Code 1914, Art. 101, Sec. 36.

CHAPTER IV

The Conditions of Employment

The enactments of the state regulating the conditions of employment of the workingman, the safety and sanitation laws, are the most important features of a constructive labor legislation program. True, the activity of the state in the fields discussed in the two preceding chapters is most essential to the welfare of the laborer, but the statutes relating to the labor union and the compensation law are for the most part amendatory of the common law. Such interference of the state in labor matters was directed to making more efficient the existing means for the reform of labor conditions, that is, to the development of the union and to the modernizing of the common law to fit present day industrial conditions; the remainder of this study will be concerned with the extent to which the state should intervene in private affairs in the attempt to ameliorate labor conditions.

The most important matter with regard to which the state exercises its power of intervention is the regulation of the environment in which the laborer conducts his daily task. This dogmatic statement might be strenuously contested by some labor reform advocates and by some economists, but their position seems to be much weakened by an unproportioned estimate of present conditions and future possibilities. The contention that the foremost problems and concerns of labor are unemployment, wages and hours may be admitted without disproving the contention that the prime object of state activity is the safeguarding of the employee in his daily work. Not only historically was this the first concern of the state in industrial conditions, but practically it affects more intimately and more uniformly

the whole mass of workingmen. State employment officers may find work for a part of the unemployed who rarely comprise more than eight per cent of the working class; the state may set a minimum wage for the hopelessly weak bargainers; and the state may regulate hours in the extremely overworked trades; but, in all these, the great majority of the workers are working out their own salvation with constantly increasing success. Safety and sanitary legislation, on the other hand, affects every laborer. The unit of reform, so to speak, is the factory, not the individual; and it is this distinction which brings these factory laws peculiarly within the function of the state and takes them out of the scope of private and voluntary means of reform.

It is hardly necessary at this late date to argue that safety and sanitation legislation is proper in the present status of industrial conditions. Not even the most extreme adherent of laissez-faire can deny that competition and the absence of regulation reduce the conditions of labor below the standards of decency and good health. Even the most extreme individualists admit that the police power of the state extends to the reasonable regulation of working conditions. Only the opposition of the capitalist, who naturally objects to the expenditure of his money for the benefit of others, and that without any easily perceptible advantage to himself, deters the legislators from enacting the fine, ideal laws which have been drafted for them.

Regulation by Commission.—There is, however, some dispute with reference to the preferable mode of regulation if not to the necessity and kind of regulation. Until five years ago all safety and sanitary laws, if complete, were lengthy, minute enactments covering every known condition of employment and laying down absolute laws to apply to every preconceived condition. Set screws, unguarded belts, and other dangerous devices were absolutely outlawed, but there the law stopped. In 1911 Wisconsin,[1] drawing a les-

[1] Wisconsin Laws, Secs. 2394–41 to 2394–71.

son from the evolution of the governmental control of rates, applied the commission idea of regulation to industrial conditions. A general law providing for safety in industrial occupations was enacted and a commission with ordinance powers was appointed to issue orders in compliance with this general law. Full discretionary powers are substituted for absolute and arbitrary regulation. Finding it impossible to foresee every possible contingency in which the labor law would be applied and conceiving it equally impossible to leave anything to the easily corrupted discretion of the inspectors, the legislature created a competent and responsible board to carry out its wishes. The idea of this fourth branch of government, the administrative branch, as it is sometimes called,[2] is not new in American politics. The federal government has found it advisable in handling interstate commercial and industrial conditions and the State governments have rather generally adopted the same means of controlling their public service corporations and of administering their workmen's compensation laws. In the field of labor legislation the experiment of Wisconsin has not failed to stimulate imitation; both Massachusetts and New York among the Eastern States having to a considerable degree adopted this means of regulation.

From the legal standpoint the commission is an investigating agency with, it is true, considerably more power to secure practical benefits from its investigations than have most investigating committees. The significance of this aspect of the commission's work is most obvious. As has been said, the regulation of the environment of employment is easily within the police power of the state—the protection of health and safety is the most elemental exercise of this power. The only limitation upon this control is that it must be reasonable both in the manner of its appli-

[2] Most of this discussion of the industrial commission scheme of government has been suggested by an article by J. R. Commons, published by the Wisconsin Industrial Commission, most of which appeared in The Survey for January 4, 1913.

cation and in the discrimination necessarily involved in its exercise. Because of the manner in which the commission formulates its rules, its ordinances have the prima facie weight of reasonableness greater than in the case of legislative enactments.

The commission is assisted in drawing up its orders by unpaid, advisory subcommittees on the various subjects of safety and sanitation. These subcommittees are not composed of experts fixing ideal regulations, which, as Mr. Commons says, may be reasonable in a superregulated country like Germany, but hardly in the United States; they are where possible drawn mainly from the ranks of the employers and employees, with occasionally one or two experts who are usually taken from state boards or insurance companies. These subcommittees deliberate, hear witnesses in the same manner as legislative committees, and draw up rules which are referred to the commission as "general orders." These orders are published and then considered at hearings held before the commission. If amendments are suggested to the commission at these hearings and approved by them the report of the advisors is recommitted to them. When finally approved by the commission, the "general orders" are enacted to go into effect thirty days after final publication. The orders can, of course, be attacked in court; but, as the commission has sat at its hearings in its judicial capacity its findings are presumed to be reasonable and constitutional, and even if before the court new evidence is unearthed to prove the unreasonableness of the order the order is referred back to the commission for a rehearing; the court does not absolutely annul the order. Moreover, since these orders are adopted by a body composed largely of employers, little ground is afforded for the objection of arbitrariness and public opinion has a strong lever against the recalcitrant capitalist.

Moreover, through its power to enforce the factory law, to control inspection and to enact "special orders" to fit unforeseen contingencies, the commission is enabled to ad-

minister the law more efficiently and some would be tempted to say more humanely than it otherwise could. As the commission itself characterizes this part of its work, "the work of the inspectors of the commission is *not* to ferret out points of danger and to tabulate them, but it is chiefly to do *constructive educational work*. . . . The one point which the commissioners most strongly emphasize with the deputies is that they must so present safety work that the employers will become interested and will appreciate its practical value from the standpoint of efficiency."[3] The field agents of the commission are "deputies," not "inspectors." They confer with each employer and if there is an exceptional situation in his plant, a "special order" is obtained from the commission to prevent any irritation from the operation of the general orders. The same principles underlie the educational work of the commission among the employees, for it is well recognized that safety results quite as much from the improved esprit de corps of the workers as from mechanical safety devices.

In short, everything reasonable is done to decrease the enormous loss of life and limb which had come to be considered a natural concomitant of modern industry. "Reasonableness" may be said to be the watchword of the commission. The effect of its policy has been to reduce irritation and to keep the factory law out of the courts. It seems beyond doubt that this plan of legislation will be held constitutional, for the courts have recognized this fourth branch of government in other fields; and once the legality of the fundamental law is established there can hardly be further dispute with reference to an order enacted as these orders are. Moreover, the new status of the inspection department will keep most cases out of court, for it is human nature to respond more readily to solicitous appeals than to threatening commands. In fact, it has been found in Wisconsin that once an intelligent employer has been shown

[3] Report of the Wisconsin Industrial Commission on Allied Functions for the Two Years Ending June 30, 1914, p. 9.

the most evident deficiencies of his establishment, his own sense of justice will often prompt him to undertake a thorough rehabilitation of his plant.

In Maryland, however, this scheme has not obtained any considerable foothold, and, though it is instructive to examine it in a purely disinterested spirit as a more efficient system to which we are inevitably tending, yet such a study does not take us far in the investigation of the existing laws. Maryland, however, is woefully deficient in its factory legislation; and, even in studying the existing laws, this chapter will be as often a consideration of ideals as of actual facts.

Fire Protection.—The fire hazard can without doubt be said to be the most important safety problem demanding solution by the State at the present day. Yet practically every State, unless it has adopted a new building code, within the last few years has taken decidedly inadequate measures to meet the danger. Maryland is no exception. Despite the general agreement that "an ounce of prevention is worth a pound of cure," the legislature of Maryland allows every city and county within its bounds to expend thousands in maintaining an elaborate fire department and, with the exception of the City of Baltimore, provides no fire prevention law. Even in Baltimore the laws and ordinances aimed at the prevention of fire are not at all in proportion to the hazard. It needs a tragedy to arouse the American public to action and, because as yet there has been no holocaust in Baltimore, we are content to await one before enacting the proper laws.

Practically the entire fire law of Baltimore and, in considering this subject, Baltimore will take the place of Maryland as the unit of discussion since the fire hazard has been considered important enough for legislation only in this city—practically the entire fire law of Baltimore is in the hands of the building inspector. Now, at the beginning of this chapter, the excellencies of an elastic law were extolled; but the fire law is one wherein certain fundamental

maxims and orders can be laid down with precision, and have been laid down in states where legislation has been carefully enacted, as in New York. Moreover, when the law is elastic it should be administered by a competent commission under some pressure to enact orders and not by the arbitrary will of one political appointee to office. Of the fire laws affecting places of labor which do not depend upon the discretion of the inspector, one forbids the "proprietor of any sweatshop or factory where four or more persons are employed to use any coal oil, gasoline, etc. . . . for the purpose of lighting or heating in any form."[4] Not only is this the only absolute provision of the fire law, but, as far as I can discover, it is the only provision looking to fire prevention and not to fire escape. Another law does in a way provide a barrier against fire in decreeing the fireproof construction of the first floor of buildings to be built after 1906;[5] but this fire prevention is in the nature of a protection to the physical structure of the workshop and not to the lives of the workers, for experience has demonstrated that, as far as human life is concerned, fireproof buildings are as dangerous to those in the buildings as non-fireproof structures.

These two laws also provide for a means of escape; and in this respect are of value, but being incomplete these provisions are less important than those which have just been considered. In the latter law it is ordered that, in all new buildings, "the entire stairway shall be built of fireproof material," but as the best fire escape is often useless if it is open to the inroads of smoke and flame, the omission to provide for a fireproof enclosure around the escape robs this portion of the law of most of its value. The earlier law commands fire escapes in sweatshops or factories "where four or more persons are employed as garment workers on other than the first floor" of the building. The qualification of garment worker is, of course, pernicious;

[4] Laws 1898, Ch. 123; Baltimore City Code 1906, Art. 4, Sec. 280.
[5] Baltimore City Code 1906, Art. 3, Sec. 82.

and it is alleged that this provision of the building code is further weakened by the arbitrary interpretation of the word fire escape by the building inspector whose requirements are met by one unenclosed fireproof staircase or even by two wooden staircases in separate parts of the building.[6]

The other laws enforced by the building inspector are even more lax and inefficient, and they are to a certain degree overlapping and confusing. One provides that "all manufactories employing twenty-five or more persons . . . [shall] have the proper means of exit in case of fire or panic" in the discretion of the inspector of buildings.[7] An ordinance of the mayor and City Council of Baltimore makes the same stipulation for buildings in which five or more are employed;[8] and a final provision decrees that any building "in which operatives are employed in any of the stories above the first story shall be provided with such fire escapes, alarms and doors as shall be directed and approved by the inspector of buildings."[9] This official has issued few orders of any importance.

The whole situation is unsatisfactory. The fire code is incomplete and far below the requirements of a modern industrial city. It is true that there has been no astounding loss of life in any fire in Baltimore, but this must be due more to individual endeavor than to State supervision; and, moreover, the per capita monetary loss in Baltimore is still oppressively high as compared with European cities and the foremost American cities. A systematic revision of the fire law should be undertaken. In this respect Baltimore might profit by the experience of New York. After the terrible Triangle Waist fire, New York with the aid of the Factory Investigating Commission devised and to a great degree enacted a complete system of fire laws.[10] This system,

[6] Miss Anna Herkner, then Assistant Chief of Maryland Bureau of Statistics, is the authority for this statement. See also report of this Bureau for 1912, p. 75.

[7] Baltimore City Code 1906, Art. 3, Sec. 80.

[8] Ordinances 1908–1909, No. 155, Sec. 3, Par. 6.

[9] Baltimore City Code 1906, Art. 3, Sec. 83.

[10] See New York Senate Documents 1913, vol. 13, no. 36, pt. 1, pp. 53–89; and New York Consolidated Laws, Ch. 31, Secs. 79–83.

though in its details entirely too stringent for the necessities of Baltimore, might well be adopted in its fundamentals in this city. As a prevention against fire, cleanliness and carefulness are the two essentials. Fireproof receptacles should, therefore, be required for all inflammable waste and rubbish, and these receptacles should be emptied at least once a day. Gas jets in factories should be enclosed by globes or otherwise protected and all smoking in factories should be prohibited under penalty. Furthermore, to check incipient fires automatic sprinklers should be installed. These, the New York commission says, are absolutely necessary above the seventh floor on account of the limitations of the fire fighting apparatus, but these limitations do not trouble us much in Baltimore for the simple reason that few of our factories are over six stories in height. For the benefit of the factory owner, it may be said that these sprinklers have proved their worth in from seventy-five to ninety-five per cent of the cases in which they have been tested by actual conditions, and that, moreover, they pay for themselves in reduced insurance rates.

For the protection of those caught within the building by a fire the commission formulated minute and elaborate rules. A fire alarm system, for which in Maryland there is an inadequate provision, and regularly conducted fire drills participated in by all the occupants of the building are conceived as a prime essential to avert panics. Unhampered and quick access to the exits on the various floors is also a desideratum which is so often sacrificed to the demands for space. For the fire escapes themselves elaborate rules are laid down. In the first place, outside escapes are uniformly discouraged. These escapes are practically of little use, for the inmates are not accustomed to use them; and if in a panic a few find them these few are often too bewildered to use them efficiently. Moreover, in winter the outside escapes are often slippery, and the smoke and flames pouring out of a window opening on them render them entirely useless. The most efficient escapes are horizontal

exits through a fire wall traversing the whole length of the building from ground to roof. This divides the structure into two fireproof compartments and, it is perfectly obvious, furnishes an ideal means of escape. If this is impracticable the same end may be attained by the cooperative use by two buildings of the party wall. An enclosed fireproof staircase within or attached to the building is another approved method of escape and if large enough, this staircase is perfectly efficient. The New York building code furnishes minute regulations as to the relation of the number of occupants to the width of the various kinds of fire escapes, but what has been said is sufficient to show the magnitude of the improvement possible and necessary in Maryland.

Protective Devices.—In its provisions for the safeguarding of dangerous machines the Maryland labor law is, if anything, more deficient than its provisions against fire. There are a few laws decreeing the inspection of scaffolding[11] and boilers[12] with provisions for their safety, but that is about all. There are, it is true, some general provisions on the statute books, but these, though they might be most prolific and efficient, are for the most part entirely abortive. Thus in the compensation law[13] reference is made to the power of the Accident Commission to order safety devices in the factories; but as yet this power has not been exercised, and even if it were, the exercise would possibly be unconstitutional because of the lack of notice in the title of the act. Again, the building inspector has the power to compel the repair or reconstruction of parts of buildings which "endanger the safety of their occupants,"[14] and under his power to issue permits for electrical machines[15] he may compel the use of safety devices; but these provisions have been bootless. These deficiencies in Maryland are especially

[11] Code 1911, Art. 48, Secs. 75–79.
[12] Baltimore City Charter 1915, Secs. 572–589.
[13] Laws 1914, Ch. 800, Sec. 54. Code 1914, Art. 101, Sec. 55.
[14] Baltimore City Ordinances 1908–1909, No. 155, Sec. 3, Par. 7.
[15] Baltimore City Code 1906, Ords. Art. 3, Sec. 45.

glaring when it is remembered that Wisconsin and Massachusetts by means of orders from their industrial commissions and New York by means of legislative enactments and orders have formulated an elaborate system of safety regulations for the benefit of their working people.

Under the head of safety devices, though here the personal rather than the material element is concerned, may be mentioned the full-crew railroad law.[16] This, however, the railroads have demonstrated to be not a valid safety measure, but a mere sop to the unions.

Requiring the same brief mention, but actually of much more importance, are the safety and inspection provisions for mines in Alleghany and Garrett counties.[17] These are minute and technical provisions, an extended discussion of which would hardly lend interest to this study. The details are most technical and quite beyond the comprehension of a layman. Suffice it to say that the coal mines of Maryland are considered as safe as any in the country, but whether that is because of these enactments or because of the inherent nature of the mines would require an investigation quite beyond the scope of this monograph.

Sanitation.—In the field of sanitary legislation the statute book of Maryland until the legislative session of 1914 was equally deficient. In that year special laws regulating tenement houses and food-producing establishments set rather high standards in those particular fields, but left the general law totally inadequate. There was prior to 1914 a general law providing that "all factories, etc. . . . in this State shall be kept in a cleanly condition and free from effluvia arising from any drain, privy or other nuisance; and no factory, manufacturing establishment or workshop shall be so overcrowded while work is carried on therein as to be injurious to the health of the persons employed therein, and every such factory, etc., shall be well and sufficiently

[16] Code 1911, Art. 23, Secs. 331–335.
[17] Code Public Local Laws 1888, Art. 1, Secs. 207–209; Art. 12, Sec. 161–164.

lighted and ventilated in such manner as to render harmless, as far as practical, all gases, etc., generated in the course of the process . . . carried on therein, which may be injurious to health";[18] but the Bureau of Industrial Statistics and Inspection to which by means of a court proceeding was entrusted the enforcement of this law found it absolutely impracticable because of the generality of its provisions. It was impossible to convict in any court of justice: an essential of a criminal statute is definiteness. The legislature in 1914 repealed this law, and substituted therefor a law requiring the licensing of all places manufacturing "articles of clothing, hats, gloves, furs, feathers, artificial flowers, purses, cigars or cigarettes."[19] The only condition precedent to the grant of this license is the necessity of a minimum of five hundred cubic feet of air space for every person employed—a necessary provision, but not of highly practical value—and the compliance with the existing laws and ordinances applying to these workshops. The real purpose of this law as acknowledged by its sponsors, the industrial bureau, was not to effect an improvement of labor conditions, but to show matters in their true light, to expose the real status of factory regulation, to relieve the Board of Labor of the responsibility of enforcing a practically nonexistent law and to shift this responsibility to the city officials who have the real means of coercion.

This law, it is obvious, is merely an additional means of enforcing the general laws of the State in these specified industries. There is, however, no general enactment in Maryland applying throughout the State; the nearest approach to a general sanitary provision is an ordinance of Baltimore City decreeing separate toilets for the sexes to be kept "in a cleanly and safe condition."[20] Therefore, if an industry is not located in a dwelling or tenement house, if it is not engaged in manufacturing food products, and

[18] Laws 1884, Ch. 265. Code 1904, Art. 27, Sec. 243.
[19] Laws 1914, Ch. 779, Sec. 246.
[20] Baltimore City Code 1906, Art. 14, Sec. 158.

if it is not in Baltimore City, it has to comply with absolutely no sanitary regulations, and, indeed, in these non-regulated industries the sanitary condition has been found to be very poor. No provision is made for the cleanliness of factories, an essential to good health as well as to fire protection. No provision is made for ventilation, a matter which is the subject of numerous administrative orders in other States. Not only is the ventilation of factories left to private enterprise, but the slight provision that there is for toilets does not provide for their ventilation and factory toilets are very generally ventilated through the work rooms of the factory. Only in Carroll County[21] is there any provision for a forced ventilation by suction fans to preserve the workers from lung diseases brought on by inhaling dust and noxious gases. To be entirely fair, the law requiring the sprinkling of the floors of shirt factories every morning[22] should be mentioned here, but the relief is so slight and the method is so antiquated that this narrowly limited law cannot greatly mitigate the indictment of Maryland. Finally, if we omit consideration of minor requirements, there is in Maryland no law looking to the proper lighting of factories; and the employer is at full liberty to strain the eyesight of his workers to the point of exhaustion. Although I have not made a thorough investigation at first hand, some of the actual conditions described I have myself observed; and if some first hand investigator seeks to extenuate these failings of the Maryland law by maintaining that actual conditions demonstrate on the whole that Maryland does not as yet need regulatory laws, I would answer that it is always easier to prohibit by legislation things which are not in existence and which do not represent as yet any vested right. Inasmuch, moreover, as other States have had to cope with these evils, now is the time for Maryland to legislate.

In decided contrast to this inefficient phase of the law is

[21] Laws 1894, Ch. 202. Applies only to stone-grinding mills.
[22] Code 1911, Art. 43, Sec. 102.

the recently enacted sanitary inspection law.[23] The act makes minute provision for the regulation of every place in which "food products are manufactured, packed, stored, deposited, collected, prepared, produced or sold."[24] In addition there is vested in the State Board of Health, which is entrusted with the administration of the law, full power to promulgate, "from time to time, . . . such general rules and regulations . . . for the government of the inspectors and employees of the board as may be necessary," provided it gives due notice of these orders with the opportunity of a hearing for those concerned.[25] Since the administration of the law is vested in the Board of Health, its purpose is plainly to protect the health of the community rather than to benefit the workers, but, nevertheless, improved surroundings cannot but accrue to the advantage of the employees. In so far, however, as the Board of Health considers this law a pure health measure, its orders will be and in fact have been much less in behalf of the laborers than if the administration had been vested in the labor department.

The specific provisions for the sanitary norms to be applied to the various food factories are almost ideal in their nature.[26] It is first enacted that all of the rooms, furniture and implements used in the preparation of food products shall be kept in "a clean and sanitary condition," unclean and unsanitary meaning the lack of protection of the food itself against flies, filth, etc., the failure to remove all dirt and waste product, and the failure to keep the persons of the employees clean. It might have been provided that the side walls and ceilings should be regularly lime-washed, but in the absence of this stipulation it is to be expected that the Board of Health will issue orders to fill the gap. It is further enacted that "every . . . place occupied . . . for

[23] Laws 1914, Ch. 678.
[24] Ibid., Sec. 1.
[25] Ibid., Sec. 7.
[26] Ibid., Sec. 3, Subsecs. a–f.

the preparation, etc., of food shall have convenient toilet or toilet rooms which shall be kept separate from the rooms where the process of production, etc., is conducted, and all parts of such toilet rooms shall be kept clean." Moreover, the workers are forbidden to sleep in the workroom of a bakeshop, etc., or in the kitchen or dining room of a hotel, restaurant or boarding house; and the employer is forbidden to employ any worker affected with a communicable disease unless he can produce a certificate from the Board of Health permitting him to be employed in such a place. Finally, washrooms are ordered to be constructed in these factories. Further stipulations are laid down for canneries in the State, but these are largely technical and do not add much to the general provisions.

There is only one serious omission from this law: cellar bakeries are not prohibited. It is obvious that "a cellar is unfit both for the manufacture of food stuffs and for the habitation of workers. There can be no natural light under the most favorable conditions in a cellar. They are also very difficult places to ventilate unless a mechanical system is installed, which is out of the question in the ordinary small bakery. . . . They cannot be kept as clean as other parts of the house, for they are semi-dark, and contain most of the plumbing pipes and fixtures. They are also the natural habitation of insects and rodents."[27] Although it is true that conditions in Baltimore bakeries are not nearly so bad as they are in New York and, in fact, it has been said that there are no cellar bakeries in this city,[28] the absence of the evil, as has been contended in another connection, constitutes no real argument against sound prophylactic legislation.

The Tenement Law.—In 1914, also, Maryland obtained perhaps as efficient a homework or tenement law as is pos-

[27] New York Factory Investigation Committee Report, Senate Documents of New York, 1913, vol. 13, no. 36, pt. 1, p. 222.

[28] Dr. Caspari of the State Board of Health, who has charge of the administration of this act is the authority for this statement.

sible.[29] A tenement inspection law is practically always inadequate because of the impossibility of proper inspection even with the largest corps of well-trained inspectors. A sufficient corps of inspectors may perhaps keep the tenements free from filth and disease, but an absolutely efficient administration of the child labor law or any other law affecting the terms of labor is unattainable. Investigations in New York have shown that children too young to be sent to school were put to work helping the parent and that children of school age were compelled to give help for such unreasonable hours that their school work could hardly be of any practical benefit.[30] Moreover, it was argued by some of the witnesses, that in view of the low wages paid tenement workers it could not be denied that some manufacturers were obtaining an unfair advantage in free rent and light at the ultimate cost of the State in broken-down workers; but, pregnant as this contention may be in forcefully presenting some of the evils of home work, it cannot be said to be a potent argument for State interference. If the State determines to regulate hours of labor, wages of labor and child labor, and finds it impossible to do so while tenement work-rooms exist, then, granting that it is within the power of the State to undertake this regulation, the State would have the right to prohibit home work. The health of the community can be safeguarded by adequate or approximately adequate inspection of the conditions of employment, and that is the subject of this chapter.

The act provides for the registration of every factory, workshop, or mercantile establishment employing five or more people;[31] and every room or part of a tenement house which is to be used for manufacture or repair work, except, of course, the personal work of the occupants, must first be licensed by the State Board of Labor and Statistics.[32] In

[29] Laws 1914, Ch. 779.
[30] Conducted by the Factory Investigating Committee.
[31] Code 1914, Art. 27, Sec. 264, as amended by Laws 1916, Ch. 406.
[32] Ibid., Sec. 245.

New York the licensing of the whole tenement as a unit has been found more efficient than the licensing of each workshop separately since it interests the owner of the tenement in the conditions of the separate workshops and makes an additional person responsible for the sanitary conditions. This is perhaps an improvement on the Maryland law, but not of fundamental importance, since, as it is, the manufacturer contracting out to home workers is also compelled to see that the provisions of the act are complied with in the homes to which he sends his work.[33] These administrative features are the strong points of the law, and especially so when coupled with the minimum requirement of one inspection every six months—a minimum, however, much below comparative efficiency, but expedient for the sake of economy.

Although below the most exacting standards, the sanitary provisions of the act, if conscientiously enforced, may raise home work to a satisfactory sanitary level. The Board of Labor and Statistics has powerful means in its hands to enforce these provisions, for much is left to its discretion in granting the licenses and it has power to revoke them upon the slightest infringement of the conditions of their grant.[34] The board may refuse the license if the place cannot show a clean health record. If the health record be clean, then an inspection of the place is necessary; and, if the board through its inspectors "ascertain that such room or apartment is free from . . . communicable disease and is in proper sanitary condition, it shall grant a license" for the place to be used by members of the family only, and that only to the number of one worker to every five hundred cubic feet of air space.[35] Though the New York commission recommended more stringent sanitary regulations than these, Massachusetts has practically the same provisions as has Maryland. While not ideal, therefore, the Maryland provisions at least may be said to be adequate.

[33] Ibid., Sec. 247.
[34] Ibid., Sec. 248.
[35] Ibid., Sec. 245.

In actual operation, however, the law is not so satisfactory. The final determination of the sanitary condition has been left in the hands of the local health department, for the board has found it inexpedient to controvert the findings of the health authorities as to health conditions. The effect of this has been that practically no licenses have been refused because of the presence of communicable diseases: the health authorities rarely find any evidence of such diseases or, if any is found, the conditions are soon corrected. It is hardly within the scope of this study to indict the health officials, but the performance of their part in the enforcement of the law has been, to say the least, very desultory.

CHAPTER V

The Terms of Employment

Foreword.—The question of the extent to which the State should interfere with the terms of employment is one of the most acute of modern legislative problems. In general, it may be said that as the State, on the one hand, is in most cases warranted in regulating the conditions of employment, so, on the other hand, in most cases there must be actual and positive cause for the extension of State activity to the control of the terms of employment. In general, the problem of the hours and wages of employment should be solved by the bargaining of the wage-earner and the employer.

The extent to which the State should interfere with the terms of employment is, of course, one of the questions of the science of legislation, and it should be solved according to the norms and maxims of that science. But it is practically impossible for a student of American government to consider legislative problems solely in the light of the principles of legislation. If he could do so, his task would be comparatively simple. An almost religious regard for the law of the Constitution has so imbedded itself in the legal thought of the United States that to think of framing an enactment without scrupulous respect for its constitutionality would be unpardonable sacrilege. It is this which accounts for the obvious and deplorable lack of consistency and scheme in the labor legislation of every State. The grossest inconsistency is apparent in the enactments concerning labor unions and the terms of the contract of employment.

In attempting to outline an ideal and consistent scheme of legislation, I shall attempt to prove in a subsequent chap-

ter that legislation regulating the terms of employment is only justified as a temporary expedient. Labor legislation, as has been so often iterated, is a means of equalizing the bargaining power of labor and capital, but the greatest equalizer, it will be shown, is the union. Until the ideal of complete unionization is attained, State interference with the terms of employment is justified. The courts have upheld legislation in respect to the hours and wages of employment of women and children, but have quite as unanimously overthrown similar legislation for unorganized workingmen unless the occupation is especially dangerous. They have thus established a principle of American legislation, but a principle which is unsound. It seems to be based upon two fundamental conceptions. In the first place, women and children because of their weaker nature have all through the common law been considered just recipients of the protection of the law. The courts have, therefore, always rather welcomed[1] legislation delimiting the employment of women and children. Their antagonism to legislation for adult males, however, is unjustified, for, although the weakness of women and children does entitle them to additional protection from the State against undue influence and fraud, the unorganized male laborer is in as unfair a position in making a wage contract with the average employer as the weakest woman. Mental strength has little effect against a dominating force. In the second place, the courts in upholding labor legislation of this kind put it most often in the rubric of health laws. Of course, it is true that the physical condition of women and children is less resistant than that of men, and, moreover, it is easy to argue that the welfare of the community is more strictly connected with the health of women and children than with that of men. But this is largely a matter of degree and hardly the occasion for such a strict drawing of constitutional lines. A needless inconsistency is the result.

[1] I think that I am justified in the use of this word in view of the decision in Bosley v. McLoughlin, 236 U. S. 385.

If to this inconsistency is added the pressure of all kinds of reform organizations for every conceivable limitation of the terms of labor and the cheap politics displayed by candidates competing for the vote of the laboring class, the possibilities of a shapeless system of labor legislation seem of limitless magnitude. This shapelessness has been more than achieved. Instead of the almost total absence of legislation regulating hours and wages of labor which would be the case under ideal conditions, the statutes of the average State are an enervating hodge-podge. Antiquated and useless legislation is left on the books to the confusion of the lawyer and student; conflicting laws are enacted without taking the trouble to repeal the earlier laws; criminal laws without penalties are set forth as sops to some now forgotten reform movement; and high sounding laws with fatal exceptions are in endless abundance. This is a concise and exact description of the legislation of Maryland in spite of some recent efforts of the legislators. There is absolutely no unity or system present. It must not be understood, however, that Maryland is unique in this respect. Except for those States, of which Wisconsin is the foremost example, which have practically repealed all their previous labor law and left to a commission the evolution of a new system, every State of the Union is equally guilty. Even New York, which has recently adopted almost an entire new code of labor legislation has been remiss in failing to repeal the earlier law. But for an estimate of the status of the laborer in Maryland, some study of this phase of the law is necessary. For the purposes of this chapter I have, therefore, arranged the laws under three heads: first, those prohibiting the employment of certain classes in specified occupations; second, those regulating the hours of labor; and, third, those regulating the wages of labor.

Prohibitions of Employment.—The absolute prohibitions contained in the Maryland labor law with the two exceptions referring to the employment of women as barmaids[2]

[2] Code Public Local Laws 1888, Art. 13, Secs. 195–196.

and as waitresses in places of amusement[3] are all confined to child labor. The laws forbidding absolutely the use of dangerous materials or methods in any occupation have obtained no foothold in this State. Indeed, there are few laws of this kind in the country, only one, the federal prohibitive tax on the phosphorous matchmaking industry, being a typical example. An anti-homework law might be desirable. This type of legislation is much more effective than the regulatory laws described in the last chapter, to which they are closely related, but the American tendency is towards regulation rather than absolute prohibition.

The usual prohibitions to be found in any State, then, refer to child labor; the education of the child and the protection of the young person, as he is technically called, being the ends of the law. Thus in Maryland no minor under twenty-one years of age is permitted to work in or in connection with any place where spirituous liquors are sold.[4] It seems exceedingly doubtful whether this provision is strictly enforced for the difficulties of administration are obvious. Prohibition reform would, of course, be more efficient; and even putting the enforcement in the hands of the Liquor License Board might aid in increasing the effectiveness of the law.

Children under the age of eighteen years, as in most other industrial States, are forbidden to work in or about "blast furnaces, docks or wharves; or in the outside erection and repair of electric wires; in the running or management of elevators, lifts or hoisting machines or dynamos; in oiling or cleaning machinery in motion; . . . at switch tending, gate tending, track repairing or as brakemen, firemen, engineers, etc., upon railroads; . . . or in or about establishments, where . . . high or dangerous explosives are manufactured, compounded or stored . . ." or in

[3] Code 1914, Art. 27, Secs. 442–443.

[4] Laws 1912, Ch. 731, Sec. 22 (to be Art. 100 of Code); Code 1911, Art. 56, Sec. 98.

other like occupations wherein their immaturity would render them inefficient.[5]

Children under sixteen years of age are rigidly circumscribed in their employment. They are forbidden to be employed around dangerous machines as circular or band saws, picker machines or machines used in picking wool, cotton or any other material, job or cylinder printing presses operated by machinery, stamping machines and numerous others specified at great length. They are not permitted to work upon any steam, electric or hydraulic railway or on any machinery operated by power other than hand or foot power, or upon any vessel or boat engaged in navigation or commerce. Occupations wherein dangerous or poisonous acids are used are closed to them, as is mining and the allied occupation of tunneling. They are forbidden to perform in any concert hall or playhouse in connection with any professional theatrical performance, exhibition or show.[6]

There is also a prohibition of the employment of females under sixteen where such employment compels them to remain constantly standing.[7] This is really more of a regulation of the conditions than of the terms of employment; and, though somewhat vague, it is fundamentally an exemplary piece of legislation in which Maryland seems to have established a precedence. Moreover, no child under sixteen can be employed in any occupation until he has obtained a permit from the Bureau of Statistics in Baltimore City or from the superintendent of schools in a county. These employment permits or certificates are of two classes, general and vacation employment certificates, and are issued only on the conditions of a satisfactory school record, of a favorable report from a competent physician, and evidence that the child is of legal age to work in the desired

[5] Laws 1912, Ch. 731, Sec. 21.
[6] Laws 1912, Ch. 731, Secs. 7–8, as amended by Laws 1916, Ch. 222, and see Code 1914, Art. 27, Sec. 346.
[7] Laws 1916, Ch. 222, Sec. 23.

occupation.[8] The granting of these certificates is regulated moreover by stringent administrative provisions. Similar to these certificates, but with the necessary differences, are the badges granted to boys between the ages of twelve and sixteen to sell papers and periodicals on the street during daylight.[9]

Subject to these stipulations and exceptions, it is legal in Maryland to employ children above the age of fourteen. Children under fourteen are forbidden to be employed "in, about or in connection with any mill, factory, mechanical establishment, tenement house, . . . office building, . . . public stable, garage or in any mercantile establishment . . . , place of amusement, club, etc.," in short, in most occupations.[10] The fourteen year age limit is also established to a certain degree by prohibiting the employment under that age during school hours.[11] There are, however, in the Maryland law two provisions allowing the employment outside of school hours of children above the age of twelve in "canning or packing establishments,"[12] and of males above the age of twelve in the sale of periodicals and newspapers on the streets. Boys above ten may with a permit distribute papers on a regular route between the hours of 3:30 and 5:00 p.m.[13] If the twelve year minimum is enforced in canneries and allied occupations, Maryland children are better protected than those in most other canning States, in New York, at least, it having been found practically impossible to enforce a fourteen year minimum.[14]

On the whole, this rubric of the Maryland labor law attains as high a standard as that set anywhere in the country. The Child Labor Law is a recent enactment and seems

[8] Laws 1912, Ch. 731, Sec. 9 ff.
[9] Ibid., Secs. 27–33.
[10] Laws 1912, Ch. 731, Sec. 4, as amended by Acts 1916, Sec. 222.
[11] Laws 1912, Ch. 731, Sec. 6; Laws 1912, Ch. 173.
[12] Laws 1912, Ch. 731, Sec. 5.
[13] Laws 1912, Ch. 731, Sec. 26, as finally amended by Laws 1916, Ch. 222.
[14] See Annual Report of Commissioner of Labor, New York, 1914, p. 135.

to have been drafted in a scientific and careful manner, following rather closely the laws of New York and Massachusetts, which mark a high plane in the conservative reform law of this country. There is, however, one prohibition omitted in the Maryland labor law which experts have come to consider absolutely necessary. Most European countries and four American States, Connecticut, Massachusetts, New York and Vermont, forbid the employment of women for certain periods before and after childbirth. There is no doubt of the constitutionality of such a law, for it has been amply demonstrated that the community suffers from the high rate of mortality and morbidity of babies who fail to receive sufficient care from their mothers. Such a law, however, would involve a considerable step towards communism, especially as the perfected plan would call for some kind of aid from the State during the period of enforced rest.[15]

Hours.—The regulation of the hours of labor has caused the legislators of the last quarter of a century the greatest difficulty. The exact limit of their power has not been clearly defined, and they can never be sure that their enactments compelled by the clamors of reformers, economic and political, will be upheld by the courts. It is in fact within this rubric of the labor law that the attempt is sometimes made to limit the police power of the State. Somewhere a law ceases to be an exercise of the police power and becomes a taking of property without due process of law. The doctrine of reasonableness has been formulated by the courts, but this doctrine hardly gives any true clue to the problem. It is best to say that there is much hopeless conflict between the courts and that in the end each law must be considered on its own merits.

The economic argument for restricting the hours of labor has been so often iterated and reiterated that it has become

[15] The Italian plan raises the fund for the care of the indigent mothers by taxing each woman of child-bearing age employed in any industry thirteen cents a month, each employer seven cents per month per woman of that age employed by him, and by an additional seven cents per woman contributed by the state.

shopworn; and it will not be worth while to set it forth at length. The arguments of the economists may well be accepted at their face value, but must then be considered from the viewpoint of legislation. The economic argument runs something like this: Long hours are physically injurious. Long hours stultify the intellectual growth of the individual because of lack of time for self-enlightenment. Long hours lead to immorality and excess in recreation. Long hours tend to lessen the influence of family life and ultimately to destroy it. The shortening of hours more than pays for itself in increased efficiency.[16] And then, having heaped up facts, the economist will emphasize one of them, the physical deterioration or the intellectual stultification, depending on whether the law in question bears upon women or children. The courts accept this reasoning and uphold hours-of-labor laws for women and children. When a law limiting the hours of labor of men is presented to them, the courts have generally refused to sanction it, though the economic argument for it is precisely the same. There is here an inconsistency due to the lack of a complete scheme or philosophy of labor legislation.

The limitations on the hours of labor of children in Maryland were not of a very high standard until 1916. Prior to that there was, except for the two provisions aimed at keeping messengers and newsboys off the streets at night,[17] only a general prohibition that no child under sixteen should labor more than ten hours a day in any manufacturing business in the State or in any mercantile establishment in Baltimore.[18] Now there is a strict prohibition of labor of children under sixteen in enumerated occupations, including practically all except canning and domestic labor, for more than six days in any one week, or more than forty-eight

[16] For a typical example, see the brief prepared by Mr. Louis Brandeis for the Consumers' League in Muller v. Oregon, 208 U. S. 412.

[17] Laws 1912, Ch. 731, Secs. 24–32, and see also Code 1911, Art. 23, Sec. 375.

[18] Code 1914, Art. 27, Sec. 239; Laws 1892, Ch. 443.

hours during that time, or more than eight hours in any one day, or between the hours of seven in the evening and seven in the morning. Moreover, the mere "presence of such child in any establishment shall be prima facie evidence of its employment."[19] This is an almost ideal law, the exception of canning and domestic labor being necessitated by expediency. The prohibition of night work and the final administrative provision merit special attention. Minors above sixteen are not specially legislated for in Maryland and are included in the legislation for adults.

The maximum legal extent of employment for women in Maryland is ten hours in any one day and sixty hours in a week.[20] This law was enacted in 1912 after a bitter struggle, but, as it stands now on our statute book, Maryland ranks about on the level with most other States of the country in this respect. There are, however, two exceptions in the Maryland act which are interesting. The first exception exempts from the operation of the law females employed in the canning or preserving or preparation for canning or preserving of perishable fruits and vegetables. Although this exception has been bitterly assailed by the reform forces and although it is illogical and perhaps unsocial, yet it seems perfectly justified by expediency. New York, which has enacted a ten-hour law applying to canneries, has found it practically impossible to enforce it, though the labor commissioner has hopes of slow education up to the standard.[21] Some sort of limitation of hours in canneries is needed—perhaps a graduated scale over several years would be feasible—but no law is better than an unenforced and unenforcible law. The other exception allows twelve hours' work on Saturdays and six days preceding Christmas in retail mercantile establishments outside the City of Baltimore, provided that there are two periods of rest on

[19] Laws 1916, Ch. 222, Sec. 22A.
[20] Laws 1912, Ch. 79, as amended by Laws 1916, Ch. 147.
[21] See Report of New York Commissioner of Labor for 1914, p. 133 ff.

those days and provided also that the women in these establishments work no more than nine hours a day during the remainder of the year. Here again the exception is not logically sound, but is dictated by administrative expediency. New York has a similar exception.

There is no prohibition of night work for women, that is, no hours between which women are not allowed to labor; only instead of ten hours per day being the legal limit a shorter day of eight hours is stipulated. This is a serious omission. Night work practically deprives women of any but the most meager period of rest on account of the insistence of household duties during the day when the worker is supposed to be sleeping. Moreover, night work makes the complete and efficient enforcement of the legal day almost impossible, for unless certain opening and closing hours are fixed, an inspector cannot unearth violations except by spending all his time in one factory checking up the various women as they come in and leave. Both New York and Massachusetts prohibit night work for women.

The limitations put upon the hours of labor of men are more in the nature of norms than absolute regulations. This is what would be expected. Thus eight hours is the legal day for employees of the City of Baltimore and for employees of contractors engaged in public work.[22] There is an exception allowing overtime for the protection of life and property, an exception which can easily be stretched to cover ordinary overtime. Again, there is the provision that ten hours shall be the legal day in cotton and woolen manufactories[23] and in mines in Alleghany and Garrett counties,[24] but any adult male may contract to work longer. However, for public safety, street car employees[25] and train dispatchers on a railroad employing the block system[26] are limited to twelve and eight hours a day, respectively. These laws

[22] Laws 1910, Ch. 94. See also Laws 1916, Ch. 134.
[23] Code 1911, Art. 100, Secs. 1–2.
[24] Code Public Local Laws 1888, Art. 12, Sec. 165; Art. 1, Sec. 194.
[25] Baltimore City Charter 1915, Secs. 793–5.
[26] Code 1911, Art. 23, Sec. 323.

are not important in a general estimate of labor conditions. The public-works law does give some evidence of the strength of labor as a political force and the ineffective laws display a further attempt of the legislature, bootless this time, to curry favor with the workingmen, but neither are particularly instructive examples of State activity.

Wages.—When we come to consider the third kind of legislation regulating the terms of employment, laws with regard to the wages of labor, an entirely new field is opened to the investigator. There are, of course, the enactments protecting the laborer against the fraud and delay of the employer, but what is most interesting to the student of legislation is the recent tendency of States to set minimum wages for various classes of workers. This is a reversion to the Middle Ages practice of setting a "fair and just" wage with the significant substitution of a legal minimum for a legally absolute wage. The distinction certainly is significant, but both the "fair and just" and the minimum wage are enactments of a very paternalistic government.

Recognizing "that not only hours and working conditions where there is inequality of bargaining, properly concern the state, but that the question of wages also has a direct connection with the welfare of the worker, and therefore of the public," a score of states, American and foreign, have enacted minimum wage laws. "Wages," it is further stated by this advocate of these laws, "have a decided bearing on the health of the employees. The workers who have sufficient nourishing food and who live under healthful conditions are more resistant to the evil effects of working conditions. Living conditions are dependent to a very large extent upon working conditions, and a betterment of hours and wages means a betterment of the mode of living and therefore of the efficiency of the worker."[27] The argument is incontestable if health is the standard according to which the state should guarantee every worker a "living wage,"

[27] Report of Industrial Commission of Wisconsin for Two Years Ending June 30, 1914, p. 58.

the protests of the capitalists to the contrary notwithstanding; but if the goal of state regulation is to establish equality of bargaining power, if the aim of state interference is to remedy causes, not symptoms, then minimum wage legislation seems beyond the limits of state activity, although perhaps a useful temporary expedient. Maryland has no minimum wage law, and, according to the doctrines which are advocated in this study, her stand is correct.

All of the laws, of course, apply only to females and minors, for the same reasons that all other laws relating to the terms of employment are restricted to them. Most of the enactments are general in their wording, leaving to administrative boards the interpretation of the general terms. "Every wage paid or agreed to be paid by an employer to any female or minor employee . . . shall be not less than a living wage" except that incompetents may be granted licenses to work at lower rates, says the Wisconsin law; and a "'living wage' shall mean compensation . . . sufficient to enable the employee . . . to maintain himself or herself" in "reasonable comfort, reasonable well-being, decency and moral well-being."[28] To administer these laws steps are taken very similar to those described in the last chapter in connection with the commission form of labor legislation. Some kind of commission is always given the administration of the law. If the commission has any reason to believe that the wages paid females or minors in any industry or trade are unreasonably low or if any individual or organization complains to the commission that such conditions exist, the commission will begin an investigation into the wage conditions in that industry. This preliminary investigation is usually ex parte and is in the nature of an inquest by the grand jury. If the commission decides that there is reason to believe that there is some truth in these suspicions, it appoints a board composed of employees and employers with sometimes a representative of the public to

[28] Wisconsin Acts 1913, Ch. 712, Sec. 1729, s-1, (4) and (5); 2, 7.

investigate thoroughly and determine on a living wage. This board usually has power to summon and pay witnesses and every one interested may appear. The minimum decided upon, either per day, per week or by the piece, according to the industry, is then reported back to the government commission, before whom may appear any complainants who are aggrieved at the board's findings. When the legal minimum is finally proclaimed, all employers in that industry must conform to the rulings of the commission. In some States, however, for example, Massachusetts,[29] the penalty for disobedience is merely uncomfortable publicity. If the minimum wage is really well founded such a sanction is sufficient.

It is obvious that under a minimum wage law the employer is not obliged to pay for what he does not receive, he must only pay a little more than he has been accustomed to pay. He is not obliged to pay a piece-worker so much per week no matter how much she may loaf during the week. He is not obliged to pay the unskilled as much as the skilled. The delinquent is allowed to work for less than the competent and children for less than adults. Most industries will not be affected by the legal minimum—wages there are above it—and those affected are expected to get more work for the higher wages through the increased efficiency of the workers. The minimum wage laws have been evolved to a high degree of efficiency in their details. Arguments against them must attack the fundamentals, not the superstructure.

Of an entirely different nature from the minimum wage laws are those enactments regulating the wage agreements of adult men; for though these laws are general and apply to all workers, it is because they include men that new legislative and constitutional principles are involved. This legislation is justified on the ground that it is aimed primarily at fraud. The employer on account of his position

[29] Massachusetts Acts 1912, Ch. 706, as amended by Acts 1914, Ch. 368.

as trustee for the earned but unpaid wages of his employees is in such a superior position that he is able, if he wishes, to exercise the most fraudulent compulsion upon the workers. It is at this evil that this last class of laws affecting the terms of labor is aimed. An example, though a rather extreme example, of the protection afforded by the State is the law forbidding railroad companies doing business within the State to withhold any part of the wages of its employees for the benefit of any relief association or the members thereof.[30] Most of the laws, however, are aimed at the insidious truck system, as it is called, which has now fortunately become practically extinct in the eastern sections of the country.[31]

The truck system has largely depended upon the fact that nature is so perverse as to establish her most necessary metallic resources in out-of-the-way places. Mining communities have always been on the economic frontier of civilization. A not unusual occurrence is the springing up of a full-sized town out of an uncultivated waste. In these cases the mining company is generally the owner of the town, the land, the homes and the public buildings. If not thus far centralized, at least the source of the food supply is in the hands of the mining company. At first the company is performing a real economic service in establishing the company store, and it is a real benefit to the workers to have a steady source from which to purchase their necessities instead of having to rely on the possibility of an itinerant huckster. This is the good side of the truck system; and, perhaps, in the right hands, the company store might remain a benefit to the laborers, although the monopolistic weapons of the shop are of a really dangerous nature. But

[30] Code 1911, Art. 23, Sec. 315.

[31] Most of the information about the truck system has been taken from the Report of the Commissioners Appointed to Inquire into the Truck System, 1871. The general features of the system are so constant that, it is believed, nothing has been lost by using an English instead of an American source, especially since the English source is generally available and compact.

the truck system is usually attended by much more sinister forces.

The truck system is usually sustained by the maintainance of long intervals between pay days, although in Scotland it was found to exist where the interval was only two weeks. Now the miners as a class earn just about the marginal subsistence wages and have very little chance to be provident. If the employee does not begin his employment under the necessity of obtaining credit, he has many chances of acquiring this unenviable position. The company store avails itself of this opportunity in two ways. Sometimes it merely extends credit to the laborer, establishing a sort of lien on his accruing wages and collecting this lien by a system of bookkeeping in the company's office or by setting up a collection office so close to the paymaster's window that escape from its clutches is impossible. Its credits are therefore much safer than those of any chance competitor. Sometimes, where there exists the system of advances from the company's coffers on the men's wages, the store profits by a kind of moral compulsion to spend this voluntary advance in the company store, although more tangible constraint is not unknown: "black lists are often kept of slopers [those who do not spend the advances in the company store]; threats of dismissal were repeatedly proved; and cases of actual dismissal . . . are not rare."[32] Moreover, even the most provident among the employees seem to think it to their advantage to deal at least to some extent at the company store: it is a natural impression for the worker to think that his job is more secure if he caters to his employer. The dominance which the employer can secure over the laborer is evident, the double profits which he can reap are enormous. And, moreover, the laborer rarely gets fair play, for monopoly and the credit features of a company store allow the owner to advance prices to a

[32] Report of the Commissioners Appointed to Inquire into the Truck System, 1871, p. xvi.

considerable extent. The truck system, indeed, seems to call most urgently for state regulation.[33]

In legislating upon this subject Maryland has had a checkered experience. The coal fields in the two western counties of the State furnished an ideal opportunity for the growth of the company store; and, though the conditions and the acts passed to meet those conditions are not of practical importance to-day, yet because of the number of these laws and because of the decisions based upon them it has been thought worth while to spend enough time on them at least to outline them. As far back as 1868 the legislature decreed that "no railroad or mining corporation . . . shall own, conduct or carry on any store, or have any interest in any store."[34] This law does not seem to have been very effective, for two other laws, this time local in their effect, were later enacted. By these every corporation engaged in mining or manufacturing or operating a railroad in Alleghany and Garrett counties was compelled to pay the wages of its employees in legal tender of the United States;[35] and, in Alleghany County, it is further provided that "no such corporation . . . shall issue any script or metallic or paper checks in payment of the sums due such employees, nor shall such employees make any contract with their employers by which such employees shall be compelled to purchase their supplies, merchandise or goods from any private or company stores owned and operated by said employers; nor shall . . . [the employers] exercise any influence whatever . . . to compel their employees to deal with any particular merchant or storekeepers."[36]

This last amendment makes this law about as inclusive and adequate as it is possible to make a law regulating such a multiform evil. It is the direct outgrowth of a Maryland

[33] A regulation and prohibition of the truck system has been held constitutional in Knoxville Iron Co. v. Harbison, 183 U. S. 13.

[34] Laws 1868, Ch. 471, Sec. 217; Code 1911, Art. 23, Sec. 311.

[35] Code Public Local Laws 1888, Art. 1, Sec. 185; Laws 1892, Ch. 445.

[36] Amendment added by Laws 1900, Ch. 453.

case[37] construing an allied act and of a Supreme Court decision.[38] To understand this law a little history must be indulged in. The local law for Alleghany County as first passed was declared constitutional as a justified exercise of the police power of the State in Shaffer v. Union Mining Co.;[39] but it was held in this case that an assignment of wages to merchants who were tenants of the mining company was not included within the prohibition of the act. This decision much weakened the law, for the truck system has been found just as noxious when the store is run by tenants of the company as when run by the company itself. The law in fact proved inadequate and there was passed a bill rendering it unlawful for any officer or director of a mining or railroad corporation to have any interest in any general store in Alleghany County.[40] This act was aimed at what has recently become well known as interlocking directorates, but it was almost immediately declared unconstitutional as interfering with the equal protection of the laws.[41] "Though it was perfectly competent," say the court, "for the legislature to prevent railroad and mining corporations from engaging in the business of bartering or selling goods . . . ; yet it was not within the power of the General Assembly to deny to particular individuals who happened to be officers of those corporations, and merely because they were such officers the right which every other citizen of the country . . . possessed to sell goods." And further, "the owners of a mine have no other control over the employee 'than that which may result from employing him, etc.; and every other employer of labor has precisely the same control over those who obtain or wish to obtain employment with him.'"[42] In this case the court clearly refused to take judicial cognizance of the truck system and

[37] Luman v. Hitchens, 90 Md. 14; 46 L. R. A. 393.
[38] Knoxville Iron Co. v. Harbison; see above.
[39] 55 Md. 74.
[40] Laws 1898, Ch. 493.
[41] Luman v. Hitchens; see above.
[42] Quoting from Frorer v. People, 141 Ill. 171; 16 L. R. A. 492.

especially of the truck system as it flourished in Alleghany County, Maryland. The case was decided on purely legal grounds; and, being one of those cases in which constitutionality was peculiarly a question of fact, it is submitted that the court was in error. This case, however, is not so reactionary and destructive as a case which followed it, that of Luman v. Hitchens. This case led to the amendment of the earlier law and the amendment, as has been intimated, is really more efficient than the unconstitutional act.

Thus far only those laws directly attacking the truck system have been considered; but since the truck system depends for its maintenance upon long intervals between pay days, acts regulating the time of pay will be practically as efficacious as the out-and-out company store laws. Maryland has three such acts on her statute book, though it is probable that only one is really constitutional. This is a law contained in the corporation article of the code decreeing that "every association or corporation doing business in the State of Maryland employing wage earners . . . in the business of mining, manufacturing, operating a steam or electric railroad, street railway, telegraph, telephone or express company shall make payments in lawful money of the United States semi-monthly to said employees."[43] This law seems to include all businesses mentioned in the previous law pertaining to corporations engaged in mining and shipping coal in Alleghany County,[44] so that this earlier law is entirely superseded. A later act was passed, however, applying the same terms to "all corporations and *individual mine-owners* . . . engaged in mining coal or fire clay in Garrett County."[45] This addition of "individual mine-owners" was the result of the decision of Luman v. Hitchens,[46] which was interpreted as based on the singling out of corporations for stricter regulations. In State v. Potomac Coal Company,[47] however, the court on the ground

[43] Code 1911, Art. 23, Sec. 123.
[44] Laws 1896, Ch. 133.
[45] Laws 1910, Ch. 211.
[46] Cited above.
[47] 116 Md. 380.

of the earlier case declared the later act unconstitutional as a violation of the "equal protection of the laws" clause because the law was confined to the mining industry in the one county. The court again based its decision on purely legal grounds and seems to have narrowed the police power to an unreasonable extent. Though the court's argument seems discouragingly restrictive, and not specifically based on facts, the facts do nevertheless to a great degree uphold it, for the truck system in 1911 was not nearly so insidious as it was when the court refused to recognize it in 1899. It is, however, lucky that the adverse decision of the court came after the truck system had virtually disappeared, for it would have been practically impossible to legislate against it if the industries in which it was prevalent could not have been reached by special legislation.

Any discussion of state regulation of the terms of employment should include at least a mention of the tendency towards state aided pensions for sickness, old age, unemployment and the like. This movement has attained great prominence in many foreign countries, and recently Great Britain has followed the lead of the more radical Dominions. One such scheme of state aid in the unemployment insurance of labor unions will be discussed in the last chapter as a means whereby the state might obtain control of union affairs. As such, as a governmental device, these pensions are perhaps justified; but, as purely social legislation, they are quite beyond the police power of the state as it is conceived in this study, whether we define the police power from a legal or a legislative point of view.

CHAPTER VI

Some Miscellaneous Laws

There will be considered in this chapter a number of laws which are only incidentally labor laws, but which play an important part in the legal and social welfare of Maryland. These will be treated under four heads: (1) license laws; (2) laws governing attachments and liens for wages—laws of legal practice and procedure primarily; (3) child welfare laws; and (4) State employment laws.

Licenses.—There is in Maryland the beginning of a license system. In so far as it is intended for a comprehensive system of licensing occupations in order to make the State a sponsor for the proficiency of its working people, the Maryland license laws are really only a beginning, but compared with the license laws of other States, they seem fairly extensive. Licenses are required of barbers, plumbers and chauffeurs throughout the State, and of electricians, horseshoers, moving picture operators, stationary engineers and master stevedores in Baltimore City. Practically the only important occupation licensed in other States which is not licensed in Maryland is mining; but withal the Maryland miners are an efficient and intelligent class.

Licenses are required by the State for two reasons. Some license laws, as, for instance, those controlling peddlers and real estate dealers, are enacted purely for revenue purposes. They indirectly serve as police measures, but their primary purpose is to secure revenue.[1] The other class of license laws, beginning with those regulating the practice of medicine and law and extending down to horseshoers, are enacted primarily as police measures to protect the public from quacks and inefficient workmen. To this

[1] See Coates v. Locust Point Co., 102 Md. 297.

class belong all the laws affecting the laborer except perhaps the master stevedore law,[2] which as it now stands in its emasculated form is hard to understand. As first enacted, it required both a license fee and a bond to secure the payment of wages to the journeymen stevedores. The Court of Appeals, however, declared the bonding provision unconstitutional, but did not question the licensing section;[3] yet it is hard to see why, if the State can protect those workers who are hired by a master stevedore against fraud and insolvency by a twenty-five dollar license fee, it cannot more adequately protect them by a thousand dollar bond. The regard of the courts for the historical activities of the State and their aversion towards new modes of State activity is perhaps the only explanation.

The other laws,[4] if considered together, suggest an interesting hypothesis. Except for the chauffeurs, an exception which is easily explained, all the occupations licensed in Maryland are organized into substantial unions. Is the State, perhaps unconsciously, rendering a most valuable aid to the organizing of these occupations? That the unions are strongly in favor of these laws and that they put forth every effort of which they are capable to secure them is an unconcealed fact; that their efforts are of much avail and that the results are beneficial is more debatable. That these laws are of some use seems indisputable. A typical instance is furnished by the operation of the laws of the Middle Western States licensing miners. When a strike is the order of the day, the men in the mines stop work and the mine owners are unable to fill their places because of the lack of licensed men outside the ranks of the strikers. This is true,

[2] Baltimore City Charter 1915, Sec. 700A.
[3] Steeken v. State, 88 Md. 708.
[4] The various laws are codified as follows: Barbers, Code 1911, Art. 43, Secs. 209–222; Chauffers, Code 1911, Art. 56, Sec. 139; Electricians, Baltimore City Charter 1915, Sec. 663, m–q; Horse-shoers, Baltimore City Charter 1915, Sec. 515, a–f; Moving Picture Operators, Laws 1912, Ch. 814; Plumbers, Code 1911, Art. 43, Secs. 223–229, with exceptions contained in Laws 1912, Chs. 764, 845; Stationary Engineers, Baltimore City Code 1906, Sec. 427, as amended by Laws 1910, Ch. 662, and Sec. 428.

of course, only if employment at the time of the strike is at a high ebb; but employment usually is at a high ebb when a strike is essayed, for this weapon is only efficient in prosperous times. The a priori argument advanced as to the benefit to the unions of licensing laws seems again to be borne out by the fact that most licensed occupations are organized, though, here too, the argument is not conclusive because of the probable functional relation of organization and license laws. The argument based on the unorganized condition of such licensed occupations as trained nurses and chauffeurs, which is often used to offset that conclusion that licensing and unionization are closely related, seems hardly tenable because of the inherent nature of these occupations. That licensing is not a sufficiently strong unionizing device to unionize unorganizable occupations is freely conceded, but it is nevertheless strongly maintained that it is a stimulus towards organization. The desirability of unionization by means of a licensing system is doubtful. It certainly tends to make the union policy one of restriction rather than of progress; and if its effect is to cause the American unions to pattern their policy after that of the British unions, it is open to strong disapprobation.

The administration of these laws is not of much importance in this study and as it is practically the same in all the laws, one explanation will suffice. Except for the chauffeurs, where the administration is quite naturally in the hands of the automobile commissioner, all of the laws are enforced by a board generally of men practiced in the regulated occupation and generally appointed by the governor. The meetings of this board are in most cases left to the discretion of the board itself, though sometimes a minimum is fixed and sometimes, even in general laws, a certain number of meetings must be held in Baltimore. The members of the board are usually paid a per diem and travelling expenses to be obtained from the fees of the applicants for licenses. The board is allowed full discretion in setting the examination where an examination is required, and this dis-

cretion seems well placed because of the practical training of the members of the board. The applicant must qualify only once before the granting body, but in the case of plumbers, moving picture operators and stationary engineers the license is good for only one year and the worker is of right entitled to a renewal upon the payment of a renewal fee. There has been some litigation as to the interpretation and application of these laws,[5] but since these laws are not of great importance in the sum total of labor legislation of the State, the litigation needs no discussion.

Attachments and Liens.—There must next be considered certain laws which, if not in all cases a protection of the laborer, aim to further his welfare in legal proceedings. Maryland does not hold any peculiar position in regard to these laws, neither above nor below the average, for it has been generally agreed that they are just and necessary and, in most States, are of the same general nature. They include mechanics' lien laws, laws preferring wages in assignments and similar laws. These laws are justified upon the ground that the workingman, since he must always work a certain length of time before he receives his wages, is always to a degree involuntarily in the debt of his employer. The employer really stands more in the nature of a trustee to the workingman than of a debtor, for the laborer hardly looks upon his contract as one in which he extends credit to the employer. It is right, therefore, that the laborer should have greater security for his wages than the ordinary debtor for his debt. The truck laws, which have already been considered, are a related branch of legislation, which seems proper irrespective of the conditions of the laborers as a class.

In pursuance of this policy, the Maryland legislature early began to accumulate these laws on the statute books. Thus there are mechanics' liens extending to buildings, ma-

[5] Concerning the plumber law, see Davidson v. State, 77 Md. 388. For the interpretation of the barber law, see State v. Tag, 100 Md. 588.

chines, wharves, bridges, boats[6] and even wells in Garrett County,[7] giving to those engaged in the construction of these structures priority in the security for their wages over all except in the case of vessels, prior mortgages and sales. So also, in insolvency assignments, wages due for not more than three months are preferred to all claims except prior recorded liens on the property;[8] and in an execution against property in Alleghany and Garrett counties sufficient of this property is exempted to pay all wage claims.[9] In a different spirit but again from public policy toward all and not toward a class is the exemption of all tools and mechanical instruments from execution on a judgment.[10] Still different and really quite without the scope of labor legislation are those laws regulating strictly the attachment[11] and assignment[12] of wages. These last are merely mentioned because the words "wages" or "laborer" occurs in them and, therefore, necessarily the workingman is affected by them; they are not social legislation to so great an extent as are those, for example, preferring the laborer in insolvency.

Child Welfare.—A third group of laws deal with children, apprenticeship and education. Their philosophy is the same as that of the laws considered in the preceding chapter, which the State has enacted in conservation of child life. Their subject matter, however, is not the relation of employer and employee, but the policy of the State toward its children and, hence, is not included in the terms of employment.

Historically, the apprentice law came first. When it is remembered that the first Maryland enactment of this kind was as early as 1715,[13] it is hardly necessary to explain

[6] Code 1911, Art. 63, Secs. 1–52.
[7] Laws 1894, Ch. 608.
[8] Code 1911, Art. 47, Sec. 15.
[9] Code Public Local Laws 1888, Art. 1, Sec. 193; Art. 12, Sec. 149.
[10] Code 1911, Art. 83, Sec. 10.
[11] Code 1911, Art. 9, Secs. 33–34.
[12] Code 1911, Art. 8, Secs. 11–17.
[13] See Laws 1715, Ch. 19.

that the State has not seen fit to regulate the terms of apprenticeship, which it has properly left to the individual and especially the union, but has merely laid down the fundamental principles upon which the contract or status of apprenticeship is based. The law as it now stands,[14] for instance, allows the father, but not the mother,[15] to bind out a minor child until the age of twenty-one in the case of males and eighteen in that of females. The Orphans' Court may also bind out for the same term any orphan whose inheritance is not sufficient to support him, or any other child whose parents fail or are unable to support him. Of course the prohibitions against child labor are binding upon the Orphans' Court.

Then there is the elaborate school attendance law[16] of 1912 which was passed in connection with the child labor law of that year and which requires every child not mentally deficient between the ages of eight and fourteen to attend school throughout the entire session, and also every child between the ages of fourteen and sixteen unless he has been granted an employment certificate. An efficient and complete administration has been provided in this act and in these respects it is perfectly adequate. The usefulness of the act, however, depends upon the general usefulness of the school system, and although the Maryland school system is perhaps above the average, it still falls short of the highest standards. Without going beyond the scope of this study mention may be made of the schools of mining which have been authorized in Alleghany County for the large mining population of that county.[17]

The latest activity of the State in the field of child welfare is the limited mothers' pension law of 1916.[18] Here again we have a stretching of the function of the State until it verges rather dangerously upon socialism. The law,

[14] Code 1911, Art. 6.
[15] Baker v. Lauterback, 68 Md. 69.
[16] Laws 1912, Ch. 173.
[17] Code Public Local Laws 1888, Art. 1, Secs. 218–225.
[18] Laws 1916, Ch. 670.

however, though properly classed as social legislation, is hardly in the rubric of labor legislation, and an intensive examination of its philosophy would be superfluous. "Any mother of a child or children under the age of fourteen years, whose husband is dead, and who is unable to support it or them and maintain her home" may apply for relief to the county commissioners in the counties or to the special Board for Mothers' Relief for Baltimore City. If, after investigation, it is found "that unless relief is granted, the mother will be unable to support and educate her children, and that they may become a public charge," she is referred to the Juvenile Court which may order to be paid her twelve dollars per month for the oldest child, ten dollars for the next, and six dollars for each additional child up to forty dollars a month. The administrative agency is to keep in touch with its dependents, to visit them at least once every two months, and to see that the relief is properly applied for the welfare of the children.

State Employment.—The last series of laws which fall into a clearly defined group are those laws in which the State regulates the terms of employment of its own employees or those of its subdivisions. In the United States this kind of legislation is generally political in its nature, it is generally passed primarily as a bid for the labor vote and only secondarily as a social measure; but on the Continent, in Germany particularly, this species of legislation plays an important part in the administrative organization of the country.

In the first place, it has been decreed that preference shall be given to voters in filling the jobs on the public work of Baltimore City.[19] A probable reason for this law is to enable the party in control of the city government to use the city's money for electioneering purposes. The other laws regulating this subject are not so brazen, yet their political effect is as certain. "For all laborers, workmen or mechanics who may be employed by or on behalf of the

[19] Baltimore City Code 1906, Art. 35, Sec. 6.

Mayor and City Council of Baltimore," eight hours shall constitute a day's work except in emergencies. Moreover, "the rate of per diem wages paid to laborers, workmen or mechanics employed directly by the Mayor, etc., shall not be less than two dollars per diem," and where the work is contracted out "not less than the current rate of per diem wages in the locality where the work is performed shall be paid";[20] and these wages shall be paid weekly.[21] This legislation has always been upheld as constitutional, but it hardly seems that the State is performing a proper legislative function in enacting these laws. It is quite true that the State has a right to stipulate in its contracts any terms that it wishes, but efficiency demands that an administrative head have some discretion in respect to the terms of employment which he contracts for. The laborer would hardly suffer from the exercise of administrative discretion and its resulting elasticity. Yet it must be admitted that practically every State of the Union has felt the necessity of enacting legislation of this type.

Massachusetts State employment legislation represents a more extreme type. Superficially it may seem a startling step towards socialism, but on closer examination it seems to have been an attempt to secure efficient administration. It is aimed at attaining that thing, so harsh-sounding to the democratic ear, yet seeming so necessary in a representative government, a bureaucracy. In the first place, a civil service examination must be passed before one is eligible for a state job.[22] Then to secure some sort of permanency in state employment and to make this employment more attractive, a state-aided old-age pension scheme is devised for state, county and city employees.[23] It is a well-known fact that Massachusetts has a very efficient government. How far its efficiency is due to the measures just mentioned is diffi-

[20] Laws 1910, Ch. 94, Sec. 2.
[21] Baltimore City Code 1906, Sec. 47.
[22] Massachusetts Revised Laws 1902, Ch. 19, Secs. 12–13.
[23] Mass. Laws 1910, Ch. 559; Laws 1911, Ch. 532.

cult to estimate; but in view of European experience it seems that something like the Massachusetts plan is necessary to invigorate American administration.

Laws which defy classification are: the Sunday rest law,[24] the law establishing Labor Day,[25] a law requiring every employer to allow all of his employees sufficient time for voting at all elections,[26] and a law of 1912 requiring physicians to report all cases of occupational sickness which they are called upon to attend.[27] The last named law as it now stands is designed merely for statistical purposes; but since it may lead to greater things in the way of the prevention of occupational diseases it is properly treated as a labor enactment. Finally, in pursuance of the special care which the law has always had for seamen, there is on the Maryland books a law protecting them from the solicitations of any kind of sailors' employment agencies.[28]

[24] Code 1914, Art. 27, Sec. 435.
[25] Baltimore City Code 1906, Art. 15, Sec. 2.
[26] Code 1911, Art. 33, Sec. 91.
[27] Laws 1912, Ch. 165, Sec. 5A.
[28] Code 1911, Art. 84, Secs. 1–7.

CHAPTER VII

The Administrative System

The lawyer usually feels that administration and law are things apart and a legal treatise generally contents itself with a consideration of the substantive law, leaving administration to the care of the social reformer. With the exception of the law of the labor union, however, the present study has been confined to the analysis of the works of social reformers. Moreover, we have been dealing with the science of legislation quite as much as with the science of law, and legislation generally includes administration. The common law and most codifying legislation is remedial, compensatory; labor legislation is restrictive, prohibitive. Labor legislation, though it is often attacked as class legislation in its narrow and obnoxious sense, is in reality enacted for the benefit of the community as a whole; its violation is more in the nature of a crime against the state than an injury to the individual. In the community, therefore, lies the responsibility of guarding against the violation of this legislation, against the slightest deviation from its prescriptions. In the community, not in the individual, must rest the initiative of bringing this law into operation.

An adequate labor law is accordingly dependent upon efficient administrative provisions. As a chain is no stronger than its weakest link, neither is labor legislation more efficacious than its administrative system. Considering Maryland legislation from the standpoint of administrative efficiency one cannot grant it high rank. Even the greatest optimist would find himself somewhat doubtful, to say the least, of the sagacity of the sovereign people of Maryland after a talk with those charged with the administration of the labor law. In order to give this subject adequate treat-

ment in this study, it has seemed best to give first a complete description of the administration as it now exists and has existed, refraining as far as possible from any critical comment. Having tried to understand the existing system, we shall subject it to criticism and then attempt to outline an adequate scheme of administration.

Before going any further, it must be understood, the title of this chapter to the contrary notwithstanding, that there is no administrative system for carrying out the labor laws of Maryland. Administration there is, but system—hardly. This criticism, of course, has been partly met by the legislation of 1916; but this reform—for reform it was—hardly necessitates any qualification of the statement that Maryland, like most other American States, is happy-go-lucky when it comes to legislating. A preconceived system is rarely, if ever, thought out. An evil arises; it is legislated against; and, if administration must be provided for, a special official or board is designated. That is what has happened in the labor legislation. In spite of the recent centralizing amendment, there are still eight separate and distinct administrative agencies for Maryland labor law, only one of which, the State Board of Labor and Statistics, is charged with the administration of more than one law. Besides this board, there are the State Board of Health, the city inspector of buildings, the city health commissioner, the Industrial Accident Commission—all real administrative devices, and the police marshals, the constable of Carroll County, and the city collector of water rents, who perform administrative functions in connection with the labor law.

State Board of Labor and Statistics.—By far the most important administrative agency is the State Board of Labor and Statistics. This, by the act of 1916,[1] is the Maryland equivalent of a labor department, though still a rather circumscribed equivalent. It is the successor to and an improvement upon the old Bureau of Statistics and Informa-

[1] Laws 1916, Ch. 406.

tion, which, as originally established in 1884,[2] was hardly more than what its name implies, a bureau for the dissemination of information, but which by gradual accretion and the accompanying process of selection was burdened more and more with the enforcement of the labor law, until within the last two or three years it had come to confine itself entirely to labor problems. The new state board is, of course, entirely devoted to labor problems. The old bureau was the only centralizing influence in the Maryland labor law and the endeavor of the legislation of 1916 was to increase this centralization.

The State Board of Labor and Statistics is composed of three commissioners appointed by the governor for a two-year term. One of the commissioners is designated chairman by the governor at a salary of twenty-five hundred dollars and the other two are merely advisory members of the board. The chairman is the executive head of the board and most of the activities of the department are directed by him personally. The board as a whole meets only once a month to determine the policy of the department. Its business, however, is, it would seem, more to ratify the acts of the chairman than to lay down any positive policy, for the chairman with his more intimate knowledge of the affairs of the department should be able to dictate rather effectively the administrative program of the board. This is especially so for the reason that the duties of the board are not administrative in the broader sense, as described in the fourth chapter, but are almost entirely executive. The Maryland legislature followed the plans of New York and Massachusetts, but did not give the commissioners the administrative powers which they have in those States. The board is a good beginning, but as the law now stands, the two advisory members seem somewhat superfluous.

"The State Board of Labor and Statistics is authorized and empowered to appoint . . . such deputies, inspectors, assistants, and employees of every kind as may be necessary

[2] Laws 1884, Ch. 211; Code 1911, Art. 89, Sec. 1.

for the performance of the duties now or hereafter imposed upon it," provided, however, that all appointments shall be subject to the approval of the governor.[3] The board has now[4] sixteen employees, including two medical examiners, two boiler inspectors, two mining inspectors, its regular inspectors, officers to issue child labor permits, clerks and stenographers. These positions are all frankly regarded as political plums. The only qualification needed by an applicant is sufficient political "pull" in his or her ward. Not only that, but since the board cannot hire the cheapest service without the approval of the governor, it results that when once employed, it is impossible to discharge for any reason an inspector upon whom the party in power depends to carry his ward. This is absolutely true of the men employed in the department. The women, it is said, are easier to remove on account of inefficiency because they do not swing so many votes. Moreover, I have been told, though my informant is a woman, the then assistant-chief of the old bureau, that as a whole the women are more likely to be efficient than the men; and certainly they take their work more seriously. Yet it cannot be proposed that all the inspectors should be women, for men are required for some jobs. About half the employees of the board are women.

The duties of the board are many and varied. Inherited from the old bureau is its duty to collect and disseminate information. The board is "to collect statistics and examine into the condition of labor in this State, with especial reference to wages, and the causes of strikes and disagreements between employers and employees."[5] In the law are set forth many other matters of economic interest concerning which the board is ordered to investigate and publish information, but of late the board has confined itself rather closely to labor conditions. In pursuance of the duty imposed upon it by these sections of the law, the board publishes annually a lengthy report to the governor.

[3] Laws 1916, Ch. 406, Sec. 1, Par. 3.
[4] July, 1916.
[5] Code 1911, Art. 89, Sec. 2; Laws 1888, Ch. 173.

The board is also empowered "to organize, establish and conduct free employment agencies, in such parts of the State as it may deem advisable, for the free use of the citizens of the State."[6] This is a great improvement over the old law, which provided for only one agency, but it is still deficient in that the legislature does not seem to realize the seriousness of the problem of unemployment. It is now usually held that a system of free employment offices which aims to increase the fluidity of the labor market is one of the most efficient remedies of unemployment.[7] As a consequence of this, the State should expend every means to furnish the most adequate system. This Maryland has hardly done. The board has established agencies in Baltimore, Cumberland, Hagerstown and on the Eastern Shore, but these agencies are not closely enough coordinated. In connection with the establishment of free employment agencies, the board should have the licensing and supervision of private employment agencies; but this power is vested in the city collector of water rents.[8]

The state board, it will be remembered, has also in its charge the administration of the law providing for the settlement of labor disputes.[9]

The chief duty of the board, however, is the inspection of factories and workshops. There are three inspection laws which the board enforces, the factory inspection and industrial registration law, the child labor law, and the women's ten-hour law. For this inspection the board has appointed five inspectors in Baltimore City, one, with the possibility of an increase to two in Western Maryland, and one on the Eastern Shore, each at a salary of about one thousand dollars. For the purposes of this inspection, Bal-

[6] Code 1911, Art. 89, Sec. 2, Par. 7, as amended by Laws 1916, Ch. 406, Sec. 2.

[7] For a full treatment of this subject, see an article on state employment agencies by Wm. M. Leiserson in 29 Political Science Quarterly, p. 28.

[8] Ordinances of Mayor and City Council of Baltimore, 1909–10, No. 433.

[9] See Chapter II.

timore is divided into five districts, each of which is assigned to an inspector who is responsible for the inspection and conditions in his district. How this responsibility is enforced has not yet been worked out and seems to be in a rather vague state, but a system of checking up could be easily instituted. But this localization of the work of an inspector can lead to valuable results if the inspector by frequent visits can get into friendly relations with the employer and persuade rather than force him to better the conditions of his plant. It is doubtful whether this consummation can be attained under the present law, but the beginning is worth while. In the first place, the laws as they now exist lay down exact rules and leave nothing to the discretion of the board or inspector, and the instructions given to the inspectors accentuate the routine character of their work. In the second place, the inspector has to inspect in pursuance of three separate acts and it seems that the districts will be too large for the intensive inspection that this plan requires. It is doubtful in fact whether five inspectors are sufficient for the minimum efficiency of the laws. Finally, the character of the inspectors who are political appointees of doubtful efficiency is such as to make decidedly improbable the attainment of the best results and to render doubtful the careful inspection which the laws require.

Turning now to the first of these laws which the board enforces, the factory inspection and industrial registration law,[10] we shall examine the administration of it in detail before considering the other two laws. It has already been said that the inspection facilities for the enforcement of this law are deficient both in quantity and quality; but even with four or five inspections per shop a year by trained inspectors, which would furnish an adequate inspection, it is doubtful whether this act could reach the pinnacle of efficiency. As far as obtaining information and statistics from the employers and workers covered by this act, the board

[10] Laws 1914, Ch. 779.

has full and discretionary authority, and the reports in this respect are valuable, notwithstanding their incompleteness due to the shiftless methods of the inspectors. When, however, the actual enforcement of the sanitary and safety provisions of the law is considered it is obvious that the division of authority in the enforcement of this act makes completeness impossible.

When the inspectors are sent out on their tours of investigation, their duty is to visit and inspect thoroughly every factory, workshop or tenement shop in the territory to which they have been assigned. Upon visiting the work place the inspector notes the toilet conditions, the presence of fire-escapes and the location of staircases, the existence of any communicable disease, and, if the shop savors to the least degree of tenement or loft shop, the inspector further measures the cubic capacity of the room. This is the routine whether the inspection be within the regular investigation or whether it be undertaken upon the application of a home-worker for a license for his shop. The standards of the inspection are the same in both cases, for the license, as will be remembered, is revocable at any time by the board. After completing the investigating for the day, the inspector returns to the office and notes the results of his inspection on the forms provided for filing. That is as far as the inspector goes.

The report as thus filed is subject to the authority of three separate administrative agencies. The board has the power in itself to enforce only the provision limiting the number of persons employed in any room to one to each five hundred cubic feet of air space. If the shop inspected seems to lack adequate fire-escapes required by law, the report is referred to the city inspector of buildings. In him is vested the duty of visiting and inspecting all manufactories employing twenty-five or more persons and of ruling on the adequacy of fire-escapes.[11] Neither of these duties

[11] Baltimore City Charter 1915, Secs. 80–81; Ordinances of Baltimore, 1908–09, No. 155, Sec. 3, Pars. 6–7; Laws 1908, Ch. 495.

is very strictly enforced. The inspection he leaves entirely in the hands of the State Board of Labor and Statistics, and perhaps it is better so, although the city department has, in fact, a number of inspectors. The provisions for fire-escapes are interpreted so loosely that, as has been said, they are considered fulfilled if the house in which the shop is located has two staircases of any kind in different parts of the building or one central staircase. The result of this division of authority, as is always the case, is that the law is practically nullified. The state board is afraid, and in truth is hardly empowered, to make more stringent regulations than those of the city building inspector, so that here there is no compelling authority. The building inspector, on the other hand, does not consider himself delegated with any authority to protect the safety of the employees. As the secretary of the department once said: "Oh, no; we don't make any trouble. We are a kind of complaint department. The fire department and the labor department send us their complaints and we try to straighten them out." The "straightening" is hardly in the direction of strictness.

As for the sanitary conditions of the shop, or tenement, a different course of proceeding is established. In the first place, it is provided by statute that before any license for a tenement is issued the records of the local health department shall be investigated, and if they show "the presence of any infectious, contagious or communicable disease, or the existence of any unsanitary conditions," the license may be refused without any inspection of the room or apartment. Usually, however, the room or shop is investigated, and then the report referred to the local health department. If the health department finds from its own records and the report of the inspector that the place is sanitary, a license is always issued by the board, for in this case as in others the board refuses to adopt any higher standard than that set by the more technical local department and here again the standard is low. If the health department, on the other

hand, finds from an examination of the records and report that the place is below the minimum, the license is withheld until these defects are remedied, and even then it is not issued until the approval of the health department is obtained.

It is obvious from what has been said that however good this law may be in its substantive provisions and however complete may be the records obtained under this act, in final results, because of the great division of administrative responsibility and the inefficiency of the personnel to which is entrusted the enforcement, the law fails to realize a large amount of its potential value.

Next in importance to the factory inspection law is the recent child labor law.[12] As has been said in a previous chapter, this is a most valuable act and in draftsmanship one of the best on the statute book. The act goes into great detail in establishing administrative provisions for its enforcement and an exhaustive study might profitably be made of these administrative details; but it will serve our purpose in the general estimate of the Maryland system of labor law administration merely to point out the salient features of these administrative provisions.

After the inspections under the factory law, the next duty of the inspectors is to investigate the ages and conditions of employment of children. The inspection under this law should be more efficient than under the law which we have just been considering, for no skill is required and no technical training necessary. Even a political appointee should be able to prepare a complete report. The task of the inspector is merely to see that the employer complies with certain provisions, such as the keeping of a registry, to examine the certificates of any children who are below sixteen, to ascertain the true age of any child who appears younger than sixteen, the employer being compelled to furnish within fifteen days satisfactory evidence that a child apparently under sixteen is in fact over sixteen or to cease

[12] Laws 1912, Ch. 731, as amended in 1916.

to employ that child;[13] and, finally, to tabulate the number of children employed in the various occupations in the factory. If any child is employed in an occupation below the age which the law provides, the inspector will notify and warn the employer, but usually prosecutions and the preliminaries are managed from the home office. One of the child labor inspectors under the old bureau had in practice been found to be more efficient than the others and she had been assigned to investigational work similar to that performed by the British lady inspectors. One section of the law[14] prohibits the employment of children under sixteen in certain specified employments or "in any other occupation dangerous to life and limb, or injurious to the health or morals of such child." Instead of leaving the interpretation of this section to the discretion of the individual inspector, the bureau had assigned this more efficient inspector to the work of ascertaining what are dangerous occupations and was to issue administrative orders on the basis of this investigation. This was really a notable step in advance and fuller mention will be made of it later. It is to be hoped that it will be developed further by the state board.

The task of issuing employment certificates and street trade badges is a somewhat heavy one and when the act first went into force the offices of the old bureau were swamped with applicants. Detailed provisions are made in the act as to the requirements which must be fulfilled before these permits are issued and granting them is not an indiscriminate, clerical operation. In Baltimore City the board is empowered to issue these employment certificates, and in the counties the county superintendent of schools has concurrent jurisdiction with it. In the offices of the state board there is a special inspector at a higher salary, whose only work is to issue these certificates and to keep a file of the duplicates. The two physicians, also, earn their pay merely by examining applicants for certificates. The re-

[13] Ibid., Sec. 19.
[14] Ibid., Sec. 8.

ports of these examinations promise to become valuable sociological statistics. In reality, the board issues the great majority of the employment certificates for city and counties; but when the school superintendent issues a certificate in one of the counties he is empowered to employ a physician at a stipulated fee to make the examination and is required to transmit all records to the board. One of the child labor inspectors is detailed to take charge of the issuing of badges to boys under sixteen engaged in street trade.

Both in administrative provisions and administrative practice this is one of the most satisfactory and efficient laws in the Maryland labor code. Nevertheless, there is one defect, perhaps practically unavoidable. This law and the compulsory school attendance law dovetail exactly and, in fact, the enforcement of these laws is indiscriminately confided to attendance officers and inspectors from the State Board of Labor and Statistics. The attendance officers and the inspectors are responsible and report to different chiefs who are themselves in no way related and have no official correspondence. It seems that here a valuable opportunity to check up results has been lost.

The other inspection law enforced by the state board, the women's ten-hour law,[15] has no interesting administrative features. The inspector merely notices that the substantive provisions of the law, such as the posting of schedules, are obeyed. This law, for political reasons, was formerly enforced by a special bureau composed only of women. One of the most obvious reforms of the 1916 amendment was the placing of the administration of this law under the supervision of the same agency which enforced the child labor law.

Two other inspection laws were brought under the indirect control of the State Board of Labor and Statistics by the 1916 legislature. The board with the approval of the governor appoints two boiler inspectors for Baltimore City[16]

[15] Laws 1912, Ch. 79, as amended in 1914 and 1916.
[16] Baltimore City Charter 1915, Secs. 572–589, as amended by Laws 1916, Ch. 207.

and a mine inspector for Alleghany and one for Garrett County.[17] Aside from this power of appointment and the fact that the board supplies the boiler inspectors with office rooms and receives annual reports from these officers, there is no coordination between these separate agencies. The legislature attempted to introduce a centralized system, but merely centralized the structure, not the system. The boiler inspection and the mine inspection laws have not been changed by the amalgamation. The inspectors under these laws are also political appointees, but the mine inspectors must "possess a competent and practical knowledge of the different systems of mining and [ventilation] . . . and of the nature and constituent parts of the various gases found in coal mines . . . and shall have had five years' practical experience as a miner." In his reports he is to make recommendations for future legislation for safety in mining.[18]

Finally, every physician attending a patient suffering from any occupational disease must make a full report to the state board which publishes the results in its annual report.[19] Though a minor provision, it has possibilities and already the reports make interesting reading.

State Board of Health.—Related to the work of the board of labor is the work of the State Board of Health in enforcing the Sanitary Inspection Law.[20] This law applies only to shops and factories manufacturing or handling food stuffs and, as the bureau has nothing to do with these shops except so far as they may be located in tenements or lofts, there is not much overlapping in inspection. But, logically, why should not this law be placed under the charge of the State Board of Labor and Statistics, perhaps assisted by the State Board of Health?

The Sanitary Inspection Law, as will be remembered, lays down numerous and definite specifications for the clean-

[17] Code Public Local Laws 1888, Art. 1, Sec. 196, and Art. 12, Sec. 150, as amended by Laws 1902, Ch. 124, and Laws 1916, Ch. 410.
[18] Laws 1916, Ch. 410.
[19] Laws 1912, Ch. 165, Sec. 5A.
[20] Laws 1914, Ch. 678.

liness and sanitary condition of factories or shops handling food stuffs and more stringent rules for canneries. It is a most carefully and scientifically drafted law. It may safely be said to be in the highest rank among what may be called regulative acts, a class of laws which, however, is giving way to general laws with provisions for administrative orders. The Maryland law does indeed include a provision for these orders; but, not being absolutely essential to the working of the act, none have been issued. The inspectors of the State Board of Health have, then, for their guidance in the administration of the law the specifications included within the body of the law and nothing else. True, these specifications are rather searching and well-defined, but it is impossible that even the legislature could have foreseen all the contingencies in which the law might be called into play. Accordingly, with respect to details too minute to refer to the Board of Health, numerous disputes as to the interpretation and application of the act must arise. The inspector is thrown back upon his own discretion and the law is strictly or loosely enforced according to the temperament of the inspector. Now it has not been possible for me to interview the employers affected by this law, but from the class of inspectors who are employed by the Board of Health it would seem a fair deduction that the act is administered leniently rather than strictly.

The full control over the administration of this act has been placed by the Board of Health practically in the hands of one member of that board, who has also charge of the enforcement of the Pure Food and Drugs Act. He combines the work of enforcing the two laws and uses the same inspectoral force for both. There are six inspectors scattered over the State. Owing to the fact that their work as pure food insepctors necessitates keeping their identity unknown so far as possible, it is the endeavor of the supervisor to have the same man visit a factory at as infrequent intervals as possible. The inspections are frequent, about four a year, but the continual switching around

of inspectors offsets to a great degree the advantages to be gained from frequent inspections, among the most important of which are the familiarity of the inspector with the plant and his personal amicable relations with the owner. It may be said here that the Board of Health is noted as being of the various State departments one of those least contaminated by politics, and the inspectors may be efficient so far as the Pure Food Law is concerned, in connection with which all the technical work is done at headquarters. An inspector, however, who has no technical training, whose salary ranges in the neighborhood of one thousand dollars, for whom there is little or no hope of promotion, and who has no assurances of permanency of employment, is not one to whom should be entrusted the enforcement of provisions calling for the cleanliness "which the nature of the employment will permit" or the detection of communicable diseases. The act suffers both in the nature of the administration and in the class of inspectors to whom its enforcement is entrusted.

Minor Administrative Agencies.—The Industrial Accident Commission, which is charged with the administration of the workmen's compensation law, may be dismissed with the statement that it is wholly separated from all other labor law agencies in the State. Likewise separated from any other agency is the Baltimore City Commissioner of Health in his performance of the duty imposed upon him to inspect all mercantile or manufacturing establishments in Baltimore City where females are employed to see that seats are provided for these employees[21]—a needless overlapping upon the Women's Ten Hour Law inspection. Similarly isolated and overlapping, the constable of Carroll County inspects the ventilation in stone grinding mills[22]—certainly an incongruous agency for the administration of labor laws. Hardly less so, however, are the

[21] Ordinances of Baltimore, 1910–1911, No. 547.
[22] Laws 1894, Ch. 202.

marshals of police or the police commissioners in their inspection of scaffoldings which are reported to be unsafe.[23]

Suggestions for Reforms.—All the administrative agencies charged with the enforcement of the Maryland labor law have now been described or mentioned. On the whole there is little less than absolute chaos. One department is fairly well defined, but, on the whole, no more cohesion or system is present than in a pan of peas. And yet the situation is not altogether hopeless. Other States have evolved an orderly administration out of equally or more chaotic labor laws upon a critical expose of that condition. It is hoped that this criticism by merely reporting the results in other States may lead to some such result in Maryland.

The first and cheapest reform needed is some method of taking the personnel of the various departments out of politics. Much has already been said of the disastrous results of the present methods of appointments to all positions in the administration, so that only one instance further will be cited. In 1915 the elections for governor occurred on the second of November and the term of office began on January 1, 1916. A Democratic governor was elected to succeed a Republican. A week after the November election I visited the Bureau of Statistics, as it then was, to interview the assistant-chief. It was only half-past two in the afternoon, yet there was not a single man in the office. All the inspectors were Republicans and knew or thought that they would lose their positions at the first of the year, so they had practically refused to do any work at all.

It is perfectly obvious that some sort of civil service appointment is the prime essential to an efficient administration of the labor law. Whether this shall be by competitive, technical examination or by qualifying, general examination with appointment vested in the head of the labor department is a question somewhat outside the scope of this study. The former has the advantage of securing technically efficient inspectors substantially freed from the taint

[23] Code 1911, Art. 48, Secs. 75–79.

of politics; the latter the advantage of securing all around efficient inspectors who are also more subservient to and often also more agreeable to the chiefs. The competitive examination is perhaps more suited to the present status of labor departments where there is a subdivision of functions and where the inspectors are selected for one purpose alone without much hope of promotion. The qualifying examination is more suited to the centralized system which has been adopted wherever reform has been introduced, where the inspector has various duties to perform in an inspectoral way, where he must be acceptable in appearance and manner to the employers, and where, moreover, as will soon be seen, the appointment is guarded from politics by the nature of the head of the department.

In addition to a civil service appointment, some means must be provided to attract the desirable classes to the positions in the service. We can never in America hope to inspire in our citizens the regard for government service which is present in the German, or perhaps even in the English, heart; but there is no reason why the government service should not be lifted to a higher plane than that which it now occupies. Salaries in the United States compare most favorably with those abroad, so that there is not much room for improvement in this direction without involving great expense. Improvement is needed in respect to the security of tenure, the opportunities for advancement, and the provisions for the disabilities of age or accident. We have referred in the preceding chapter apropos of the Massachusetts state pension law to the value of a pension system for state employees as an incentive to efficient administration; but nowhere in the United States does there seem to have been a proper appreciation of permanency and promotion as essentials in government employment. It is useless to press a priori arguments. In the light of the wonderful success of the English system of government in general, one may demand, in the administration

of the labor law, a graded system of inspectors with promotion for efficiency and permanency of service.

Nevertheless, such a statement of the principles of administration calls for some qualification. There must be considered the inevitable conflict of an independent, bureaucratic administration and a politically responsible administration. Abstract questions would lead us too far afield; so, concretely, should the heads of the various departments be selected absolutely by the governor or should there be promotion from the ranks? As the labor administration is now constituted, it would seem perfectly feasible to vest the selection of the entire force in a civil service board. The only reason for the political appointment of the various chiefs would be to secure uniformity of policy and political responsibility and neither of these is necessary in the Maryland system: the only policy should be an absolutely strict adherence to the terms of the law, and removal of the chiefs for cause by the governor provides all the responsibility which could reasonably be expected. It is perhaps unfortunate that all of these administrative agencies are directly subordinated to the governor and that there is no intermediate state officer responsible for them to the governor, but this deficiency does not invalidate the proposal that as now constituted the labor administration should be entirely divorced from politics. Under the scheme of administration which is now to be described, however, the present heads of departments would be merely chiefs of bureaus who could be efficiently chosen by promotion from the ranks, whereas the head of the unified department of labor, be it an individual or a commission, would be selected by and responsible to the governor. Not only administratively but also politically the centralized administrative system is the more desirable.

What has been termed the centralized administrative system has only recently made its appearance in American labor legislation. Labor legislation in the United States has been a gradual evolution without any preconceived

plan, so that the administrative result has been a hopeless hodge-podge. Under the influence of the movement for efficiency, several States have recently completely reorganized their labor law administrations into logical, centralized systems. This reorganization is precisely what Maryland needs. Civil service reform would work wonders with that vaguely outlined thing which has up till now been termed the Maryland labor department or labor departments, but to obtain real efficiency Maryland should have a true Labor Department embracing all the administrative agencies enforcing laws throughout the State. Such a reform would involve some additional expense, but exactly how much is hard to calculate because there would be a great saving in the elimination of overlapping functions. Such a reform would place some additional burden upon the legislature which initiates it, but, in establishing an administrative system to which the administration of any future labor law might in a few words be referred, it would relieve subsequent legislatures. The investigating commissions in New York and Illinois have recommended reorganization of this kind, and sufficient has been written about it to enable an amateur in administration to suggest reforms for Maryland.

The reorganized Maryland Department of Labor should be presided over by a commissioner or commission appointed by the governor. The head of the department should be the only position filled by appointment. His deputies, if there are any, the heads of the various bureaus, the division chiefs, and the inspectors would be selected by the merit system. In this way the English administrative system would be approximated, that is, a political chief with civil subordinates. If sufficient confidence can be placed in the head of the department, he should be given the power of choosing his subordinates from a list of qualified applicants and this method is especially applicable to the chiefs of bureaus who must have other qualifications than those which can be ascertained by examination. Everything pos-

sible should be done to bring about a condition in which the head of the department will be fully trusted; but, if he is not, appointment to all subordinate positions should be by competitive examination.

The Department of Labor should be divided into six bureaus: the bureau of inspection, the bureau of statistics and information, the bureau of arbitration and mediation, the bureau of mines, the employment bureau, and the industrial accident commission. The bureau of inspection would be the most important of these and it might be feasible in the present condition of the labor law to put in charge of this bureau the Commissioner of Labor himself with the aid of a deputy if necessary.

The bureau of inspection should be divided into five divisions: the division of factory inspection, the division of home-work inspection, the division of mercantile inspection, the division of steam boiler inspection, and the division of industrial hygiene. It may be objected that this subdivision is too minute for present conditions in Maryland. To a certain degree the objection is valid: some of the divisions may have little to do and one man may be sufficient to fill them. This plan, however, is not to meet present conditions only, but is to furnish a basis for all future labor legislation, and we may be sure that future labor legislation will be quantitatively greater than in the past. One of the first duties of the legislature after reorganizing the administration should be to make some of the local laws statewide, for in the main they seem to have been enacted locally because of the lack of state-wide administrative agencies. Now the inspectors in the factory, home-work, and mercantile divisions will all enforce practically the same laws. The divisions will be upon the basis of places inspected instead of laws enforced, and every inspector will be authorized to enforce any law which is applicable to the establishment which he is visiting. Moreover, entire authority to enforce the laws must be centralized in the Labor Department and all reference to local authorities must be

discontinued; the Labor Department must be made self-sufficient. Thus practically all overlapping will be eliminated.

Of sufficient importance to be entitled to special mention is the division of industrial hygiene, copied from the New York division of the same name.[24] It is what is popularly known as a bureau of "theorists," a bureau of technical experts, being composed in New York of a physician, a chemical engineer, a mechanical engineer who is an expert in ventilation and accident prevention, and a civil engineer who is an expert in fire prevention and building construction. The duty of this division is to make inspections of a highly technical nature, to make independent investigations upon which laws and orders may be issued, and to serve as general technical advisors to the department. This is an expensive division, but it is a most valuable one. It would be well if Maryland could copy the New York plan in its entirety, but that is not a necessity. To begin with, Maryland would need at least one physician to supervise the issuing of child-labor permits and the inspection of food-producing establishments. The mechanical engineer would be a valuable adjunct to the Industrial Accident Commission and the State Insurance Fund.

The other bureaus are less important. The bureau of statistics and information should have the same functions that that bureau originally exercised; it should be the publicity bureau of the department. The bureau of arbitration and mediation should have the enforcement of the law which is now entrusted to the State Board of Labor, together with the enforcement of any more efficient law which might be enacted. The bureau of mines should be charged with the enforcement of the mining law in the western counties. The bureau of employment should be charged with the establishment of free employment offices and the licensing of private employment offices. The In-

[24] New York Consolidated Laws, Ch. 31, Art. 4, Sec. 60, as amended in 1913. Laws 1913, Ch. 145.

dustrial Accident Commission, which has been placed as the sixth bureau in the Labor Department, should hold a relation to the department entirely different from the other bureaus. For a number of reasons it is advisable that there be some connection between this commission and the rest of the department; but, owing to the importance of the commission and the class of men who are necessary for the adequate administration of the compensation law, it is doubtful if the commissioners should be made more than nominally subordinate to the head of the department or if they should be chosen in the same manner as are the chiefs of the other bureaus. This is a practical question calling for fuller discussion than can be given it here.

The question whether the administrative head of the Department of Labor should be an individual or a commission has been complicated in most States where reorganization has taken place by questions of legislative policy. Most of these States have enacted general laws, with delegated authority to issue specific orders, to take the place of the detailed and intricate laws on their statute books. Enough has already been said of the advantages of this mode of legislation both from the substantive and the administrative standpoint. From the point of view of administration, the elimination of all discretion in the individual inspector and the substitution of the educational, helpful attitude for the antagonistic, prosecuting frame of mind are advantages so manifest as to be undeniable.

For purely executive work, a one-man head is most desirable, but if the head of the department has ordinance powers some sort of commission is a logical necessity. Up to the present time there have been devised four forms which this commission might take. In the first place, the Wisconsin plan places all the power, executive as well as administrative, in the hands of a commission of three, an excellent plan in most respects, but it has not been followed and has been much criticised because of the weakness inherent in the division of executive authority. The second

plan is the New York scheme adopted in 1913 under which there is a single executive head, the commissioner, and an advisory board of representative men and women not subordinate to, but presided over by, the commissioner, which is empowered to draft orders. The objection urged against this plan is that which is urged against all part-time boards, the objection of inefficiency. In the third place, a slight variation of the New York plan is advocated, the single executive head as before, but a commission composed of the chiefs of bureaus. This is open to the serious objection that it confers independent advisory and discretionary functions upon officers who are administratively subordinate to the head of the department and who are, moreover, civil service appointees with technical proficiency, but hardly legislatively representative. The final plan is that advocated by the Illinois Efficiency Commission of 1914. This retains the single commissioner and associates with him two deputies, free from executive duties and of equal rank with the commissioner so far as ordinance power is concerned. Aside from the possibility of friction, the overwhelming objection to this scheme is the useless multiplication of officers for an administration the size of Maryland's.

On the whole it would seem that the New York plan, which has been adopted in a modified form by the 1916 amendment, is best adapted to the needs of Maryland. Besides the commissioner, the board is composed of four members, of whom it is advisable that one should be an employer of labor, one a wage-earner, one a physician or sanitary engineer, and one a woman. All of these offices should be filled by appointment by the governor and the salaries should be large enough to be attractive to the worthy and the influential. For the conduct of its business the board should meet once or twice a month at the call of the commissioner. Besides the work of formulating administrative ordinances, the commissioner should lay before the board all matters in which any policy or discretion is involved, except as the exigencies of a particular case may call for

immediate action. The board should also have some advisory power in the choice of subordinates, if these are selected from a qualifying and not from a competitive examination. In general, however, except in the matter of formulating ordinances, the board should be merely advisory to the commissioner, for administrative responsibility must be centered in one man and, in the last resort, the commissioner himself must be directly responsible to the governor. Centralization and discretionary power must always be balanced by responsibility.

This brief outline I have built up almost entirely independently of the 1916 reorganization of the Maryland labor administration, the form of the head of the department and the centralizing idea being the only similarities. I have been forced to do this for the reason that the 1916 amendment, although a good beginning, failed, like all pervious legislation, to take a large and comprehensive view of the situation. As has been said, by failing to go all the way it failed to realize many of its possibilities. Instead of looking to the future, the legislature only strove to correct some of the defects of the past, and accordingly future legislatures will have almost as much difficulty in attaching new duties to the state board as it did to the old bureau. The plan presented in this chapter is based upon scientific investigations conducted in the most advanced States; and while no scheme can be unalterable, this one has been elaborated with as much prevision as mankind is capable of.

CHAPTER VIII

The State in Relation to Labor

It seems rather preposterous after the description of the administration of the Maryland labor law given in the last chapter to repeat what was said in the first chapter, that Maryland is an average American State so far as its labor law is concerned. Yet calmer consideration will justify this statement. The administration, it must be admitted, is inferior, though the system of administration which is provided by statute might be made comparatively efficient. Equally poor are the safety and sanitary inspection laws with the exception of the recent sanitary provisions for food manufacturing establishments. Slightly better are the laws regulating the terms of employment of adult men, though, it must be remembered, these laws have far from justified their enactment. The other provisions of the labor law are above the average. The child labor law and the workmen's compensation law, though perhaps capable of improvement, are really exemplary pieces of legislation. The industrial disputes act and the other laws relating to the labor union are almost as good as could be hoped for. The women's ten-hour law ranks lower than similar laws in many States, but nevertheless Maryland is above the average. The nonstatutory law of the labor union, while not ideal and not even satisfactory under present conditions, is in absolute accord with the best legal thought.

In spite of the fact that Maryland deserves such a rank, a general survey of the labor law is likely to be most disappointing. The labor law considered as a whole displays the same lack of system that was evident in the administration of that law. The legislature churns out haphazardly all kinds of labor law and when the student tries to unearth

some maxims or some philosophy upon which the legislation is based, he is met with absolute chaos. Not only is this chaos present in the legislative enactments, it is also only too evident in judicial decisions. Now, we could perhaps excuse the legislatures for this deficiency, for as our state legislatures are now composed, it is hardly to be expected that they will have any continuous policy of legislation in any branch of state activity; and, in respect to the labor law, they respond to the demands of their constituents just in proportion as the proposed measure seems a good vote-getting device. But the courts which exercise a great influence upon all social legislation through their power to declare laws unconstitutional have no such excuse. They have endeavored in some cases to throw the blame for reactionary decisions upon the counsel who argued before them,[1] but this excuse—to use their own language—though perhaps evidence of extenuating circumstances does not detract from the weight of the offense.

When I say that neither the courts nor the legislature act upon any consistent philosophy of labor legislation, I am, in one sense, not speaking with strict accuracy. The legislatures do still act as they always have acted upon the theory that laws which are strenuously demanded by a great number are desirable, and the courts have formulated a maxim that legislation must be for the welfare of the general public and not of a particular class. Neither of these principles, however, is specific enough as a basis for legislation. More concretely the courts from time to time have acted upon the principle that those labor laws are proper which tend to equalize the bargaining powers of labor and capital or upon the principle that the legislature should only enact laws safeguarding the public health, morals or safety; but neither of these principles has been iterated consistently enough to be called a philosophy of the courts. There is, then, in labor legislation only the philosophic principle of individualism

[1] See Ritchie v. Wayman, 244 Ill. 509; People v. Schweinler, 53 N. Y. L. J. 81.

dating back to Jeremy Bentham as modified by present conditions in the direction of state intervention. But when it is remembered that the exceptions to the individualistic principles are more numerous than the rule, that the tendency is towards state intervention and away from laissez-faire, it will be obvious that some limitation upon state action is necessary unless individualism is gradually to change to socialism. There has as yet been formulated by legislature or court no such limiting principle and the result is a confused and chaotic mass of labor laws obeying no definite rule of the relation of the state to labor.

In attempting to outline any system of philosophy of labor legislation, we must, to conserve energy, use as many principles of existing theories or systems as is possible. Not only does such a plan conserve energy, but it also commends itself in lending greater plausibility to the new scheme. Before outlining our scheme, therefore, it will be necessary to extract the best points from the two prevalent philosophies of state activity, laissez-faire and socialism.

Laissez-faire, as has been said, is the philosophy of complete inactivity on the part of the state. Realizing the value of individual initiative, the believers in laissez-faire advocated the absolutely unrestricted development of this virtue. So sure were they of the efficacy of this quality that they were content to conceive the welfare of the state as merely the sum total of the welfare of the individuals composing it. Now the philosophy of individualism is sound in so far as it accentuates the necessity of individual initiative and this is the element which we must try to preserve; but experience soon proved that its corollary of laissez-faire was an impossible solution of the relation of the state to labor. Laissez-faire exalted competition with a hope of weeding out the unfit, but the result was a competition between classes which must function together if they are to attain the greatest common good. Instead of competition weeding out the unfit and raising the standards of social and industrial life, unregulated competition lowered

the standards to the basis of those of the lowest competitor. Not only did the individual suffer, but the community and the state were also hurt by this rampant selfishness. And the state suffers both from the individual suffering of its citizens and from the torpidity which this philosophy forces upon it. Individual initiative should be fostered, but selfishness must be carefully repressed.

As a reaction against this theory of the relation of the state to its citizen, there came into being the political philosophy of socialism. This philosophy, as I view it—and there are almost as many views of socialism as there are socialists—is the result of the theory that thinking men "no longer hope for salvation through 'the free play of individual interests,' and 'freedom of contract' . . . they are apt to identify the cause of liberty with a policy of social injustice. . . . The real test of liberty is to be found less in the form of government or in the number of laws that control the action of the citizen than in the extent to which the citizen is assured the means of self-realization."[2] So far again we may accept the tenets of this theory, but the complete socialistic program of state activity goes on to advocate at the least the socialization of all the means of production. That is, socialism in opposition to laissez-faire believes in the most intimate intervention of the state in the life of its citizens, intervention extending as far as state control, if not ownership, of all the factories, land, transportation, and other productive agencies. Socialism by the logical development of its fundamental tenet departs quite as completely as does individualism from its original concept. Socialism in endeavoring to assure to the citizen the means of self-realization by a complete system of liberty-making restrictions ends by completely stifling individual initiative. This in the last analysis is the real argument against socialism; it involves the rule of a bureaucracy in political and industrial affairs, a superabundance of laws which inevitably tend to deteriorate in quality as they in-

[2] W. Jethro Brown, Underlying Principles of Legislation, p. 57 ff.

crease in quantity, and a too frequent interference of the administrative powers of the state in the life of the citizen —all this at the expense of a proper encouragement of the vitally necessary individual initiative. If a socialism could be conceived which would preserve this one quality, it would be desirable in spite of its other faults; but so far no such conception has been formulated.

We can then begin our constructive philosophy upon these two fundamental ideas which have now received rather general acceptance, the ideas that individual initiative and self-realization must be stimulated and that a proper use of legislation can be made to contribute to this end. Individual initiative is essential to progress, but individualism untempered by state interference is an impossible principle. The state must interfere when individualism fails to achieve the greatest common good; but the state should interfere as rarely as possible, state intervention should be always the secondary consideration. As Schäffle says of the need of state intervention in the protection of labor: "It [the state] only steps in when self-help and mutual help, supplemented by ordinary state protection, fail to meet the exigencies of the situation, whether momentarily and on account of special circumstances, or by the necessities of the case."[3] The state's policy of intervention should be not only temperate, but as far as possible uniform. That is, the state should not manifest itself too variously in differentiated classes of laws, but should strive to specialize its activity. One of the causes of the failure of socialism is that the state is called upon to attempt duties too diversified. The state promotes individual initiative most effectively by confining itself as nearly as possible to its prime duty of policing, and all its activity should be closely related to this fundamental activity. Its legislation to make real the theoretical liberty which the laissez-faire philosophers believed in should be legislation which really makes the individual capable of caring for him-

[3] Schäffle, Labor Protection, p. 11.

self, not legislation which attempts to take care of the individual.

With these fundamental principles in mind, let us consider the existing labor conditions. We have traced in the first chapter the varying development of the theories of labor law and it was pointed out that not until the last period of this development, the period of laissez-faire mitigated by legislation in favor of the laborer, was the labor problem serious enough to merit activity upon the part of the state purely in solution of this problem. Moreover, it was there also shown that this last period dated from soon after the Industrial Revolution. These two facts are not chance concomitants; they have a real relation to the problem. Prior to the Industrial Revolution, the employer and employee were in intimate personal relation to each other. The employer employed few men and usually did part of the manual labor himself. He usually knew the conditions of these men and took an interest in their welfare. Moreover, the men were able to bargain successfully for their own welfare, for the employee had almost as many shops in which to seek employment as the employers had occasions to employ workmen. In other words, the business unit was so small that the individual employer had no greater monopoly of jobs than the employee had of working ability. After the Industrial Revolution, however, one employer employed hundreds and thousands of workmen. Not only did he have greater experience in hiring labor than the employee had in seeking work, but because of the magnitude of his business he had more of a monopoly of the jobs obtainable. Briefly, the employer had what the employee wanted most of all—work; he usually was not hard put to it to get what the employee had—labor; he was in a superior economic position and had more experience in making the contract of employment. The individual employee was practically at the mercy of the employer; the employer set the conditions of employment and the employee was compelled to acquiesce in them.

As an offset to this inequality of bargaining power, the workman evolved the old craft gild into the labor union. By thus combining the individuals in a particular craft into an organized whole and developing one of the members into a trained bargainer, the employees were able to balance the monopoly and the experience of the employer. Collective bargaining for the whole union was substituted for the individual bargaining of the single employee. But this solution has not been adequate. It was because unionism was incomplete, however, not because it was ineffective, that the state was compelled to legislate. The state soon discovered that it had to interfere in the labor contract; absolute laissez-faire was not feasible under a factory system of industry and an unorganized community of laborers. The more powerful employer, it was found, used his power selfishly to the detriment of the state. The state recognized the inequality of the bargaining power of the two parties to the contract and stepped in to remedy the effects of this inequality. Would it not have been better to have remedied the inequality? If the state, instead of establishing certain of the terms of the labor contract, had made the employee capable of establishing these terms for himself, its task would have been much simplified. If the state had legislated to make equal the bargaining power of the two parties, if the state had legislated to encourage the development of collective bargaining, it would have effected perhaps, not a panacea, but a much greater reform than any law so far has effected. A really strong labor union as a means of collective bargaining would render unnecessary much of the ever-increasing bulk of social legislation. To achieve unionism should be the first aim of state activity.

Experience sustains this conclusion. The well-organized —I might even say the organized—labor union asks little of the state except legal recognition and the absence of legal persecution. It is perfectly reliant upon its own powers. Through its control of labor and its own resources, it is enabled to withstand the natural ascendancy of the em-

ployer and bargain through its trained agents for its fair share of the product. It is within the scope of the union's power to bargain as to hours of labor, wages, days of rest, conditions of apprenticeship, etc. The trade union as a fraternal organization can provide for out-of-work benefits, sickness insurance, old-age pensions, and the like. What is more important, the labor union can better care for the terms of the employment of its members through its bargaining with the employer than the state could through legislative enactment, for the labor union can better recognize the local and incidental variations of each trade and better provide for them in its terms than could the state. Thus the English textile workers in conjunction with the employers maintain expensive experts to arrange sliding scales of wages and hours to conform to various conditions and to fix new terms when new conditions arrive.[4] And, furthermore, with respect to the benefits, the union is able to provide more efficient administration than the state could because of its more intimate connection with the recipients of the premiums. Together with the strength and numbers of the central and federal unions, these organizations provide a much subdivided and minutely classified administrative device for the amelioration of labor conditions. This must be considered an additional argument for the policy of noninterference, which indeed weighs very heavily in conjunction with individualistic reasoning. In these fields which have just been discussed the labor union can be perfectly efficient, but in order to be efficient, it must contain practically every worker in its trade, perhaps an entirely impracticable condition.

The labor union, however, even in its strongest condition is not able entirely to replace the state in looking after the welfare of the laborer. Certain laws must still be enacted. The state must, of course, legislate with reference to the labor union itself. The union naturally must be legalized

[4] See Webb, Industrial Democracy, for a description of this scheme and for an appreciation of its workings toward amicable relations between labor and capital.

and, as will be seen, aided in some manner before it can begin its function as efficient competitive bargainer, for the common law, especially as affected by early English labor legislation, is not friendly to labor unions. In other respects, also, amendment of the common law will be necessary to conform this inelastic system to changing industrial conditions. The workmen's compensation movement is a present instance of this branch of state activity. The labor union could inaugurate schemes of accident insurance and some unions have done so; but under the common law of master and servant a scheme of accident insurance would, in a great majority of industries, become most expensive. The state alone can abrogate the doctrine of assumption of risk and fellow-servant negligence and ameliorate or abrogate the theory of contributory negligence. Most important is it that the labor union should bargain for and help to regulate the conditions and environment of employment. Certain minor provisions, of course, the unions will always stipulate for, but conditions of sanitation, fire-prevention, and safety appliances are beyond the scope of their powers. In the framing and enforcement of such provisions expert knowledge beyond the reach of unions is necessary; and, moreover, in the fundamentals, a uniformity must exist which higgling and bargaining from their nature never can procure. Within these three rubrics, then, the legalization of the union, the correction of the common law, and the regulation of the conditions of labor, the activity of the state should be contained; beyond them is the sphere in which the state should act only in aid of the union and in furtherance of its schemes. In this way, as I see it, could individual initiative be encouraged and the state care best for the general welfare. This, in other words, is an ideal system of state activity.

Accepting provisionally this assumption, the possibility of which will be later demonstrated, that labor is fully organized, that indeed each union has a practical monopoly of the workmen in its trade, the question presents itself:

Will the unions become so strong when they have once been brought into power that they will not only control the capitalists and become the first claimants in distribution, but that they will set up a kind of inverted autocracy in which the union leaders represent their class to the entire emancipation of the capitalists? Such a result seems somewhat fantastic, but the recognition of its probability leads to profitable speculation.

In the first place, even assuming that the great proportion of laborers are unionists, the place of capital in the economic and social system would still be an important one; and, unless communism followed unionism—and this does not seem probable or even logical—the class of capitalists would be separate from and necessary to the workingmen. Moreover, when unionism is at its highest point, from one-third to one-half of the working population, farm laborers, professional men, and the like, are engaged in pursuits in which unionization is impossible or unnecessary. And it must be remembered that the unorganized portion of the population will still include the professions, the brains of the country. But, in all this discussion, that which must struggle for completion is recognized as in full bloom before any resistance or restriction is organized. Of course, this is inconceivable. With the advent of fully organized labor, there will develop organizations of employers after the nature of the present employers' associations to combat the rising menace to their profits. No government aid will be needed to help them into existence and the law will hardly antagonize them as union combatants so long as they restrict themselves to agreements concerning labor. These employers' associations will also approach to a monopoly, a monopoly of jobs, and there will be then on opposite sides two aggressive organizations, each seeking for its members the larger share in distribution. A battle under those circumstances is inconceivable. On behalf of the consuming public, the state would step in to effect control over those large labor questions whose inci-

dental variations it had left to the labor union. In other words, some form of mediation, arbitration or conciliation is necessary.

It is out of place here to enter into any detailed discussion of the modes of amicable settlement of labor disputes. The plan called for here is some kind of a government commission with the powers of one of the present minimum wage commissions to settle all questions of terms of employment which the agents of the labor union and employers' association cannot agree upon. The necessity of appealing to this commission and accepting its awards may, if necessary, be made compulsory and binding upon the acceptance of government aid by the unions. Constitutional objections will be raised, but we must sometimes remember that the constitutions are not the last word in social legislation and social readjustment.

There are, however, certain practical questions which have been slurred over in the previous discussion, but which must now be considered in all their glaring baldness. It is, indeed, one of the drawbacks of philosophizing and theorizing that practicalities always constrain one to justify his theories. Perhaps that is why there is such a paucity of theories in the world and so many "practical men."

In the first place, then, it has been assumed that, in order to guarantee to the state its proper place in the amelioration of social conditions, labor has become completely organized. "The success of a union in enforcing its demands depends upon the extent to which it has control over the labor supply in its particular occupation, since, if an employer is easily able to fill the places of those on strike, it is evident that the whole movement fails in its purpose."[5] It has been calculated, however, that only between five and six per cent of the workers of the country are organized, and that few unions control half the laborers in their crafts.[6]

[5] Weyforth, "Organizability of Labor," in Johns Hopkins University Studies, ser. xxxv, no. 2, p. 146. Much of the following has been suggested by this monograph.

[6] Wolman, Extent of Organization in the United States, MS.

These figures, however, exaggerate the problem confronting us, though they do suggest its magnitude and, perhaps, the fancifulness of the project. One of the greatest difficulties in the way of organizing laborers is the opposition of the employers to unionization. This is a natural phenomenon of competition, but it seems a passing one. Its most destructive opponents are public opinion and the growing consciousness among employers that it is to the benefit of each employer to have all the workers in his trade organized. For only then is the employer sure that his competitor is not undercutting with cheap labor, and his care is to obtain relative, not absolute, cheapness in the elements of his product. This problem, however, will find its own cure; legislation in its nature follows as well as develops public opinion. The country when willing to accept the scheme of legislation here set forth will present a concerted opinion strong enough to offset the opposition of the employers to unionization.

A more serious problem confronting the organizer of labor, from the point of view of this study, is the apathy of the laborers. This manifests itself in two forms, in the apathy of the individual worker in an organized trade and in the apathy of a whole trade resulting from the nature of the trade. The indifferent worker is a problem for modern unionism which the unions of today are fast learning to handle successfully; but, in the eyes of a scheme which would only succeed through a general appreciation of the union as the natural, fixed economic phenomenon which it seems to be, this problem sinks into insignificance. The really serious difficulty is the apathetic trade, the trade which seems impervious to organization. The unskilled, floating workers because of their great number and the aimlessness of their interest, the women in employment because of the transitoriness of their employment and because they look to marriage rather than wages as a means of livelihood, and the home-workers because the scattered condition of the employment makes enforcement of union

regulations well-nigh impossible are the black sheep of labor unionism. That a stimulating impulse is the necessity in the case of the unskilled and the women, that these classes are not impossible, but merely difficult to organize, is demonstrated by the success of such unions as the stevedores and hodcarriers and of the New York garment workers' protocol. The home-workers, if the law is content that there be home-workers, seem conclusively without the field of unionism. The isolated conditions of employment, the private nature of their occupation, make impossible such union regulations as an eight hour day, standard wages or a closed shop. But this is not fatal to the argument that the unions should regulate the terms of employment, for the same conditions would make equally impossible an efficient state regulation of these terms. Except as to the conditions of the environment of employment, which under any scheme of social legislation must come under state control, the home-workers are incapable of outside regulation.

Another class of workers who are not well organized are those who labor in small one-man industries. These include farm laborers, domestic servants, workmen in small country shops, and the workers in the so-called one-man shop. The organizing condition of these employments is analagous to that of the home-workers, but it is not absolutely incompatible with organization, as is evidenced by unions of barbers and the like. The labor problem, however, in these industries is not so acute as in the larger centralized employments, for the laborer is in intimate relation with his employer. In fact, these occupations are quite of the nature of the early forms of industry when no labor legislation was enacted, and even today these occupations are often omitted from labor legislation. Instead of enhancing, these workers may be said to mitigate our problem.

The problem then is, if it is desirable to make the greatest possible use of labor unions in the amelioration of labor conditions and if it is desirable to establish a limit to state intervention where the concerted action of the workingmen

shall work out their own salvation,—the problem then is to secure almost complete organization among laborers. Because of the antipathy of the employers and the apathy of some laborers, as explained, the organizability of labor seems to stand at a rather low level. Public opinion, it is true, plays a large part in determining the level at which the labor barometer stands, but public opinion cannot overcome all the obstacles in the way of labor organization. Active help must be furnished from the outside. It is here that the state may bargain for the controlling interest in the manipulation of trade union affairs which is necessary to amicable settlement of industrial disputes. Two modes of state aid will illustrate the kind of help necessary and the problems involved, but the exposition of these two schemes must not be accepted as exhaustive of the methods of state aid.

The first plan for state aid is in the nature of financial encouragement. One of the main weapons of organization is the beneficial system of trade union insurance. Not only is this an effective lure to the conservative workman, but it is one of the chief inducements to permanent organization when the initial stimulus of a successful strike or boycott has spent its constructive force. Two of the most important of these benefits are out-of-work and sickness benefits. The state could contribute to one of these and make the union so much more effective by its aid.[7] As a condition of this contribution, the state could stipulate that through

[7] The expense of this scheme would not be great. Taking as a typical example of the source of state aid, the State of Maryland, a fair estimate would be the addition of three and one-fifth cents to the tax rate. This estimate is arrived at in the following manner: The working population of Maryland is 541,164 (Census of 1910, Vol. V, p. 111). Deducting 222,247, the number of farm-hands, proprietors and professional men, etc., the total number of organizable workers at a generous estimate is 318,917. The average per capita cost of out-of-work benefits in two unions, the Cigar Maker and Typographic, from 1900 to 1905 was $3.55 (from tables in Kennedy, Beneficiary Features of Trade Unions, p. 91). If the State should contribute 30 per cent of this amount, again a most liberal estimate, the total cost for Maryland would be $329,647 or 3.2 cents on the tax assessment basis of 1914.

its commission or board of arbitration or some similar board, it should have intimate control over the affairs of the union. This scheme would have to meet the objections against all state insurance schemes; and it could meet them rather effectively; but none of these, because of the nature of this discussion, is important to dwell upon except the question of constitutionality, that bugaboo of all social legislation.

Under existing state constitutions,[8] this method of state aid would be illegal; but most state constitutions are easily and often amended so that the real difficulty lies in the relatively staid Federal Constitution. The "due process of law" clause interpreted as forbidding state taxation for private purposes and the "equal protection of the law" clause of the Fourteenth Amendment as usual raise their threatening forms in the path of this legislation. In the first place, would such a system of state contribution to union benefits involve taxation for a private purpose?

The first ground upon which this legislation would be sought to be upheld would naturally be as an extension of the proper state function of poor relief, for, in taxation cases, the courts lend most weight to the historical argument. It might be argued that, inasmuch as the State may relieve its poverty-stricken citizens, it should be enabled to grant aid as a preventative of those conditions. Now the two kinds of contributions, of which one is advocated, are both directed against prime causes of poverty, the sickness or unemployment of the wage-earner of the family. The argument is perfectly sound that an ounce of prevention is worth a pound of cure, but the majority of the courts of the country have refused to be guided by this proverb.[9] State relief, it has been generally held, can only be granted to those absolutely indigent. At least one court,

[8] See, e. g., the Maryland Constitution, Art. III, Sec. 34: "The credit of the State shall not in any manner be given . . . in aid of any individual association or corporation."

[9] See Goodnow, Social Reform and the Constitution, chap. 7, and cases there cited.

however, has taken the logical, if not the historical and legal, position just set forth and has upheld a preventative measure;[10] but, except as an entering wedge, this opinion lends little encouragement because of its uniqueness.

Driven from this ground by the conservatism of the courts, it is more profitable to consider whether the State is not obtaining for itself by indirect means a perfectly valid advantage. "It is obvious that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned."[11] It is useless to quote cases. The irreconcilable differences of the opinions makes it possible to quote in favor of either position. Let us then appeal to reason. By making the nominal expenditure for beneficiary payments, the State saves itself the cost of expensive commissions and experts necessary for the efficient administration of this part of the labor law, saves its legislators endless trouble by rendering unnecessary a great multitude of enactments, and exercises an interest of utmost importance in maintaining amicable relations between employers and employees, in preventing labor wars. The state takes this means of legislating with respect to the fundamentals of the labor question instead of striving to correct the deformity of modern industrial life by attacking merely the symptoms and outgrowths of the inequalities now existing between labor and capital. The State, it would seem, has a right to legislate in this manner and "it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use."[12]

This line of reasoning also makes unnecessary any extended reference to the "equal protection of the law" clause. All unions and unionists will receive similar aid

[10] North Dakota v. Nelson Co., 1 N. D. 88.
[11] Fallbrook Irrigation District v. Bradley, 164 U. S. 112.
[12] Noble State Bank v. Haskell, 219 U. S. 104, and cases cited.

from the government, and everybody will be able to secure this aid by entering a union, for, in fact, to secure complete organizations is the prime motive of the aid. The unions, through governmental insistence, must hold themselves open to receive any worker having the qualifications of the trade; and the State must stand ready to extend its aid to all unions coming into existence. All who unionize receive government assistance and those who refuse to organize have themselves to blame. The discrimination between unionists and non-unionists, in reality, amounts to very little, and this discrimination is justified by the end to be attained.

As a second mode of state encouragement to organization, a scheme lending actual assistance to the establishment of a preferential union shop in the several industries is suggested. Little argument is necessary to prove that if actual preference is given to the man bearing union credentials in obtaining the open job, great advantage is given to the union. It would, perhaps, be too difficult to attempt to absolutely enforce a closed shop or even a preferential shop by legal enactment, but any aid in this direction would be beneficial, and perhaps sufficiently beneficial to stimulate organization among the apathetic workers, certainly beneficial as a weapon against the antipathetic employers. It is not necessary to suggest a typical law, but it would be interesting to consider the constitutionality of a law similar to that which has been passed in several States penalizing the discharge of a workingman because of his membership in a union or penalizing an employer for insisting upon an agreement from the worker not to join a union during his employment, either of which would be enforced only as to unions submitting to government intervention in their dealings with the employers.

At first glance, either of these laws would seem clearly unconstitutional under decisions of the Supreme Court in the Adair[13] and Coppage cases;[14] but there is one new

[13] Adair v. United States, 208 U. S. 161.
[14] Coppage v. Kansas, 236 U. S. 1.

feature, government control, introduced which will at least weigh in the direction of constitutionality, and, moreover, it is most deferentially submitted, the decisions in these two cases are open to criticism. Both of the majority opinions in these cases were written by the conservative, if not the reactionary, justice of the bench and both of them are reasoned out upon eighteenth century notions of the inviolability of natural rights. The Court does not take judicial cognizance of twentieth century conditions as affecting these eighteenth century rights. It lays aside as immaterial the practical inequality of the employer and the unorganized worker and sees no possibility of coercion in the mutual employment agreements. "But in view of the relative positions of employer and employed," asks Justice Day in his dissenting opinion in the later case, "who is to deny that the stipulation [not to enter a union during employment] here insisted upon and forbidden by law is essentially coercive?" It is useless to attack at any greater length these decisions; the dissenting opinions are stronger than anything else which could be written. The proposed laws, however, can be held constitutional in spite of these two cases. Not only would the State be attempting to aid the unions by these laws, it would be fulfilling a purpose of its own in the amelioration of inequitable labor conditions and in the amicable adjustment of labor disputes. The unions would take on the nature of public institutions; and, as the Court says in the Coppage case, "if they were, a different question would be presented" than the one there considered.

These two methods of state aid are, then, illustrative of the kind of legislation needed to consummate the idealized condition of affairs herein assumed. To encourage individual initiative and to repress selfishness in a proper proportion, so that both the individual and the community may prosper, the State's first duty in labor legislation is to stimulate unionization. Until complete unionization is attained, the State may have to legislate in fields beyond

those to which this system would limit it; and in those fields the previous chapters of this study have sought to lay down sound standards of legislation. When, however, unionization is once complete and with it have come into existence the employers' associations, the State will be able to leave most of the terms of the labor contract to the two parties, itself intervening through the agency of the governmental commission only on the rare occasions when the public welfare seems at stake. The only other care of the State will be to keep the unwritten law up to date and to legislate concerning safety and sanitary conditions. Perhaps this outline seems too ideal, but in that it is like all logical philosophies—when they become constructive they necessarily go to extremes and extremes are not reasonable; only the mean is reasonable and that is not logical.

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